83-689

Office - Supreme Court, U.S.
FILED
OCT 24 1983
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF SOUTH DAKOTA, ET AL.,

Petitioners,

v.

LOWER BRULE SIOUX TRIBE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. DID THE ACQUISITION OF TRIBAL AND TRUST LANDS BY THE UNITED STATES, PURSUANT TO THE FLOOD CONTROL ACT OF 1944, DIMINISH THE LOWER BRULE SIOUX RESERVATION TO THE EXTENT OF THE TAKING?

2. DID THE ACQUISITION OF TRIBAL AND TRUST LANDS BY THE UNITED STATES, PURSUANT TO THE FLOOD CONTROL ACT OF 1944, ABROGATE THE TREATY RIGHT OF THE LOWER BRULE SIOUX TRIBE TO HUNT AND FISH FREE OF STATE REGULATION WITHIN THE AREA ACQUIRED?

3. DID CONGRESS CONFER UPON THE STATE THE EXCLUSIVE POWER TO REGULATE HUNTING AND FISHING BY ALL PERSONS WITHIN THOSE AREAS ACQUIRED PURSUANT TO THE FLOOD CONTROL ACT OF 1944?

PARTIES TO THE PROCEEDINGS
IN THE UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioners State of South Dakota and Jack Merwin, Secretary, Department of Game, Fish and Parks, for the State of South Dakota have been parties to this action in both the District Court and the Court of Appeals. Those parties will hereinafter be referred to as either "Petitioner" or the "State." Respondent, Lower Brule Sioux Tribe has also been a party to this action at all levels. Respondent will hereinafter be referred to as the "Lower Brule Sioux Tribe" or the "Tribe."

In addition to the above-named parties to the action, the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and the Crow Creek Sioux Tribe were involved in the proceedings before the Court of Appeals as Amicus Curiae.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	viii
JURISDICTIONAL STATEMENT	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	12
I. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.	12
II. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS COURT.	29
DIMINISHMENT	14
ABBROGATION OF TREATY HUNTING AND FISHING RIGHTS	23
CONCLUSION	36
APPENDIX	

TABLE OF AUTHORITIES

CASES: PAGE

Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982), cert. granted, 103 S.Ct. 2427 (1983) 15

DeCoteau v. District County Court, 420 U.S. 425, 445 (1975) 14, 16, 20

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 27

Henkel v. United States, 237 U.S. 43 (1915) 27

Lower Brule Sioux Tribe v. State of South Dakota, 540 F.Supp. 292 (1982) 9, 10

Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809, 813 n.1, 817, 818 n. 10, 820, 823, 826, 827 (8th Cir. 1983) PASSIM

Mattz v. Arnett, 412 U.S. 481, 505 (1973) 17

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 24

Montana v. United States, 450 U.S. 544 (1981) 27, 33

New Mexico v. Mescalero Apache Tribe, 10 S.Ct. 2378 (1983) 33

Puyallup Tribe v. Washington Game Department, 433 U.S. 165 (1977) 27, 33

Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161 (8th Cir. 1980), cert. denied, 449 U.S. 905 (1980) 27

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87, 588 n. 4, 592 (1977) 14, 16, 17, 20

State v. Hero, 282 N.W.2d 70 (S.D. 1979) 28

United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) 21

United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977) 14, 21

United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980), cert. denied, 449 U.S. 984 (1980) 28

United States v. Sioux Nation, 448 U.S. 371 (1980) 5

United States v. White, 508 F.2d 453 (8th Cir. (1974) 28

United States v. Wounded Knee, 596 F.2d 790 (8th Cir. 1979), cert. denied, 442 U.S. 921 (1979) 11

Williams v. Lee, 358 U.S. 217 (1959) 32

STATUTORY REFERENCES:

Act of February 22, 1889, 25 Stat. 676 4

Act of March 2, 1889, 25 Stat. 888, 889 4, 5

Act of September 2, 1958, Pub.L. 85-923, § 1
72 Stat. 1773 2, 6

Act of October 3, 1962, Pub.L. 87-734, § 1
76 Stat. 698 2, 6, 7

Flood Control Act of 1944, Pub.L. 78-534,
58 Stat. 887 (December 22, 1944) PASSIM

Ft. Laramie Treaty of 1851, 11 Stat. 749 4

Ft. Laramie Treaty of 1868, 15 Stat.
635 4, 5

United States Code

10 U.S.C. § 2671 32

16 U.S.C. § 460d 3, 31

16 U.S.C. § 528 32

16 U.S.C. § 688dd(c) 32

16 U.S.C. § 670h(b) 32

16 U.S.C. § 670h(c)(4) 32

16 U.S.C. § 670i(b)(4) 32

16 U.S.C. § 670k(6) 32

28 U.S.C. § 1254(1) 2, 12

28 U.S.C. § 1291 10

28 U.S.C. § 1292 10

28 U.S.C. § 1362 7

OTHER REFERENCES:

House Report No. 2054, 85th Cong., 2d Sess.
(June 30, 1958) 26

House Report No. 852, 87th Cong., 1st Sess.
(August 5, 1961) 26

Senate Document No. 247, 87th Cong., 2d Sess.
(November 21, 1944) 4

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit in Lower Brule Sioux Tribe v. State of South Dakota is reported at 711 F.2d 809, and appears in the Appendix (Appendix B, pp. A-67 to a-140). The Judgment of the Court of Appeals, dated June 27, 1983 also appears in the Appendix (Appendix C, pp. A-141-142) as do the Orders of the Court of Appeals dated July 26, 1983 denying the Petition for Rehearing and the Petition for Rehearing En Banc (Appendix D-E, pp. A-143 to 144). The opinion of the United States District Court for the District of South Dakota is reported at 540 F.Supp. 276, and appears in the Appendix (Appendix A, pp. A-1 to A-66).

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

THE STATE OF SOUTH DAKOTA, ET AL.,
Petitioners,
v.
LOWER BRULE SIOUX TRIBE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was dated and entered on June 27, 1983. The Orders of the Court denying the Petition for Rehearing and the Petition for Rehearing En Banc were dated and entered on July 26, 1983, and this

petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. The Act of September 2, 1958, Pub.L. 85-923, 72 Stat. 1773, hereinafter referred to as the Fort Randall Act, is set forth in the Appendix (Appendix F, pp. A-145 to A-155).

2. The Act of October 3, 1962, Pub.L. 87-734, 76 Stat. 698, hereinafter referred to as the Big Bend Act, is set forth in the Appendix (Appendix G, pp. A-156 to A-183).

3. The Flood Control Act of 1944, Pub.L. 78-534, 58 Stat. 887, hereinafter referred to as the Flood Control Act, is set forth in the Appendix (Appendix H, pp. A-184 to A-204) as is the codification of Section 4, Ch. 665 of the Flood Control Act, as

amended, found at 16 U.S.C. § 460d (Appendix I, pp. A-205 to A-210).

STATEMENT OF THE CASE

In 1944, Congress enacted the Flood Control Act of 1944, Pub.L. 78-534, 58 Stat. 887, which authorized a comprehensive plan of flood control for the Missouri River basin. Part of that comprehensive plan included the construction of several multi-purpose dams and reservoirs in the State of South Dakota. Pursuant to § 9 of the Act, four dams and reservoirs were constructed on the mainstem of the Missouri River in South Dakota; the Oahe Dam, the Big Bend Dam, the Ft. Randall Dam and the Gavins Point Dam. The reservoirs created behind the dams were described as "multi-purpose reservoirs, on the mainstem of the Missouri River for flood control, navigation, irrigation, power, domestic and sanitary purposes, wildlife,

and recreation. . . ." Sen. Doc. No. 247, 87 Cong., 2d Sess., 2 (Nov. 21, 1944).

The construction of these dams and the resulting reservoirs resulted in a loss of many acres of valuable land for many South Dakota citizens owning land along the Missouri River, including several Indian tribes with reservations bordering the Missouri River. The Lower Brule Sioux Tribe was one of those reservations.

Congress created a separate reservation for the Lower Brule Sioux Tribe by the Act of March 2, 1889, 25 Stat. 888. South Dakota had become a state barely one week earlier. Act of February 22, 1889, 25 Stat. 67[illegible]. The tract set aside for the Lower Brule Sioux Reservation was part of the larger reservation which had been established for the Sioux Nation, first by the Ft. Laramie Treaty of 1851, 11 Stat. 749, and then by the Ft. Laramie Treaty of 1868,

15 Stat. 635. See United States v. Sioux Nation, 448 U.S. 371 (1980). The reservation was located in central South Dakota adjacent to and extending westward from the Missouri River. The eastern boundary of the reservation was described as commencing in "the center of the main channel of the Missouri River at Ft. Lookout; thence north in the center of the main channel of the said river to the original starting point . . . ," which was described as "on the Missouri River at Old Ft. George." 25 Stat. 888, 889.

Although the reservation was diminished along its western border in 1899, 30 Stat. 1362, and again in 1906, 34 Stat. 124, the eastern boundary continued as described until land acquisition began for the Ft. Randall Dam and Reservoir Project. Tribal lands needed for the Ft. Randall project

were taken by the federal government pursuant to the power of eminent domain. See United States v. 7,996.62 Acres, and Lower Brule Sioux Indians, Civ. No. 186, (D.S.D., C.D. June 25, 1963). Congress subsequently enacted the Ft. Randall Act to provide additional payments to the Indians of the Lower Brule Sioux Reservation, "in settlement of all claims, rights, and demands of said tribe and its members arising out of the construction of the Ft. Randall Dam and Reservoir Project. . . ." Act of September 2, 1958, Pub.L. 85-923, § 1, 72 Stat. 1773.

Four years later, Congress enacted the Big Bend Acquisition and Settlement Act which provided for the taking of "the entire interest" in approximately 14,299.03 acres of reservation land for the construction of the Big Bend Dam and Reservoir Project. Act

of October 3, 1962, Pub.L. 87-734, § 1, 76 Stat. 698. Section 1 of the Big Bend Act also provided for payment "in settlement of all claims, rights and demands of the tribes and individual Indians arising out of the taking under this Act." 76 Stat. at 698.

The Lower Brule Sioux Tribe initiated the present controversy in the United States District Court for the District of South Dakota seeking to enjoin the State of South Dakota from enforcing its hunting and fishing laws in that area which the tribe contends is within the external boundaries of the reservation and also seeking a declaratory judgment that the State of South Dakota had no jurisdiction over any person within the exterior boundaries of the reservation for purposes of regulating hunting and fishing. The action was commenced pursuant to 28 U.S.C. § 1362.

The State of South Dakota counterclaimed seeking a declaration from the district court that the State has exclusive jurisdiction to regulate hunting and fishing by all persons within those areas taken for the Ft. Randall and Big Bend Dam and reservoir projects. The State contended that the Ft. Randall Act, the Big Bend Act and the Flood Control Act resulted in the diminishment of the Lower Brule Sioux Reservation to the extent of the area taken, and further that those Acts abrogated the Ft. Laramie Treaty of 1868, to the extent that the treaty had reserved hunting and fishing rights to the tribe, within the area taken.

Both parties moved for summary judgment. The trial court, in its memorandum opinion and final judgment dated April 30, 1982, held that the Lower Brule Sioux Reservation was diminished to the extent of the

United States' acquisition of tribal and trust lands for the Ft. Randall Dam and Reservoir Project, but was not so diminished to the extent of the taking of tribal and trust lands for the Big Bend Dam and Reservoir Project. The trial court further held that the 1868 Treaty of Ft. Laramie had been abrogated by the Acts to the extent that that treaty reserved to the tribe and its members the right to exclusively use and occupy the areas, and the right to hunt and fish in the area free of state regulation. Finally, the trial court ruled that the State of South Dakota, pursuant to these three Acts, had the exclusive jurisdiction to regulate hunting and fishing by all persons within the areas taken. The trial court reserved the question of which party could exercise regulatory jurisdiction outside of the taking areas. See Lower

Brule Sioux Tribe v. State of South Dakota, 540 F.Supp. 292 (1982).

The Lower Brule Sioux Tribe filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit on May 5, 1982. The State of South Dakota filed a cross appeal on May 17, 1982. Jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. §§ 1291, 1292.

The decision by the Court of Appeals dated June 27, 1983 reversed the District Court's decision and remanded the case to district court for a redetermination of who possesses jurisdiction to regulate the hunting and fishing by non-members of the tribe within the Ft. Randall and Big Bend taking areas. See Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809 (8th Cir. 1983). The Court of Appeals agreed with the district court that the Big Bend

Act did not diminish the reservation. However the Court of Appeals disagreed with the lower court as to the effect of the Ft. Randall Act, and held that the Ft. Randall Act also did not diminish the reservation. Cf. United States v. Wounded Knee, 596 F.2d 790 (8th Cir. 1979), cert. denied, 442 U.S. 921 (1979). The Eighth Circuit also reversed on the abrogation issue, holding that the Flood Control Act, Ft. Randall Act, and Big Bend Act, did not abrogate the Lower Brule Tribe's hunting and fish rights. Finally the Circuit Court held that the Flood Control Act envisioned a scheme of federal regulation by the Corps of Engineers, and that absent Corps regulation of hunting and fishing, the tribe had exclusive jurisdiction to regulate the hunting and fishing by tribal members within the taking area. The State filed a timely petition for

rehearing and a petition for rehearing en banc, both of which were denied by orders dated and filed July 26, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE PETITION

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

This Petition presents to the Court a two-pronged question concerning the jurisdictional status of those lands acquired and taken by the United States from the Lower Brule Sioux Tribe for purpose of constructing the Ft. Randall and Big Bend Dam and Reservoir Projects. The Big Bend and the Ft. Randall Acts were two in a series of seven acts of Congress which took reservation land adjacent to the Missouri River in order to construct dams within the Missouri

Basin Project. These taking acts were passed to implement the Flood Control Act of 1944 in North Dakota and South Dakota, and specifically related to reservation lands. Citation to those seven statutes is found at footnote 1 of the Court of Appeals decision. See Lower Brule Sioux Tribe v. South Dakota, supra, 711 F.2d at 813 n.1.

The first prong of the question presented is whether the Big Bend Act and the Ft. Randall Act diminished the Lower Brule Sioux Reservation. The second prong of the question is whether those two Acts, when considered in conjunction with the Flood Control Act of 1944, abrogated the tribe's treaty right to hunt and fish in the area taken. The Eighth Circuit Court of Appeals in reversing the decision of the trial court held that Congress intended neither diminishment of the reservation nor abrogation of

treaty hunting and fishing rights by way of the Ft. Randall and Big Bend Acts. In reaching its decision, the Eighth Circuit Court of Appeals decided both the diminishment issue and the abrogation issue in a way which conflicts with the applicable decisions of this court.

DIMINISHMENT

While this Court has had the opportunity in recent years to determine whether a particular act of Congress was intended to diminish other Sioux Indian reservations in South Dakota, those cases involved surplus land acts which opened those reservations to settlement by non-Indians. DeCoteau v. District County Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). In fact,

another such diminishment case is currently pending before this court. See Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982), cert. granted, 103 S.Ct. 2427 (1983).

The diminishment issue presented by this petition, however, is substantively a good deal different from the surplus land acts analyzed in the previous diminishment decisions of this Court. The question here is the effect of two acts of Congress which authorized the acquisition of Indian lands for a public purpose in pursuance of the policies of the Flood Control Act of 1944. It is clear from even a cursory reading of the Ft. Randall Act and the Big Bend Act that the forces and considerations motivating Congress to enact these "taking statutes" differ substantially from the "familiar forces" at work in securing the enactment of the surplus land acts. While

the analytical procedure, including the appropriate canons of construction, employed in determining surplus land act diminishment cases is undoubtedly applicable to some extent in all diminishment cases, the substantive analysis must of necessity differ to permit consideration of those indicia of diminishment which are unique to the legislation being examined.

Although the Eighth Circuit Court of Appeals appropriately cites this Court's decisions in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) and DeCoteau v. District County Court, 420 U.S. 425 (1975) for the applicable canons of construction in diminishment cases, the Eighth Circuit fails to properly apply the holdings of those cases even to the limited extent that the surplus land acts are similar to the taking statutes. The diminishment decisions of this

Court teach that an intent to diminish must be expressed on the face of the act or be clear from the legislative history and the surrounding circumstances. Mattz v. Arnett, 412 U.S. 481, 505 (1973). In all cases, these three factors must be considered with an eye toward determining what the intent of Congress was. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977). These cases also teach that the indicia of diminishment should not be considered in a vacuum; an overview of all relevant factors must be considered to determine what the congressional intent was. Rosebud, supra, 430 U.S. at 586-87. Furthermore, this Court has made clear that factors from which intent is inferred in one case should not be treated as absolutes in subsequent cases. Rosebud, supra, 430 U.S. at 588 n.4.

The Eighth Circuit Court of Appeals, however, does not follow the guidelines set

down by this Court in making its determination on the diminishment issue. The Eighth Circuit simply never considers the totality of those circumstances indicative of congressional intent to diminish. Instead, the Court of Appeals approaches the diminishment question in a piecemeal fashion, concluding that a number of separate factors, when considered separately, fall short of "clear language of express disestablishment." The Eighth Circuit simply failed to consider the impact of all those factors as a total picture of congressional intent.

Furthermore, in those instances where the Court of Appeals does discuss indicia of diminishment similar to those factors present in the diminishment cases decided by this Court, the Eighth Circuit does not accurately apply the lessons of Rosebud and DeCoteau. For example, although the Eighth

Circuit recognizes that the pertinent statutory language in both the Big Bend Act and the Ft. Randall Act is "very similar" to the statutory provisions in both Rosebud and DeCoteau, the Circuit Court finds that the language is not a clear expression of an intent to disestablish. It justifies its holding with the following analysis of Rosebud and DeCoteau:

> "Indeed, in Rosebud and DeCoteau, the Supreme Court recognized that statutory provisions very similar to those employed in Section 1(a) of the Big Bend Act did not constitute 'clear language of express termination' as is evident from the Court's heavy reliance on the legislative histories and surrounding circumstances of the acts in question to support its findings of disestablishment."

Lower Brule Sioux Tribe v. South Dakota, supra, 711 F.2d at 817.

This is quite simply a misreading of DeCoteau and Rosebud, both of which held

that this "very similar" language was "precisely suited" to the purpose of disestablishment. DeCoteau, supra, 420 U.S. at 445; Rosebud, supra, 430 U.S. at 592. In DeCoteau and Rosebud, as is true here, the tribes were paid a sum certain for the surrender of all their interest in the lands in question. This Court in both Rosebud and DeCoteau then went on to conclude that the legislative history and the surrounding circumstances supported that reading of the face of the respective statutes, not because that statutory language was not expressive of the congressional intent to diminish, but because all the factors indicative of intent must be considered together.

Another example of the Eighth Circuit's misapplication of this Court's guidelines is evident from its treatment of the statutory reference in the Ft. Randall Act to the reservation "as diminished." The Eighth

Circuit relies on its pre-Rosebud and pre-DeCoteau decision in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) to find that the statutory phrase "'as diminished' standing alone is ambiguous and does not demonstrate a clear congressional intent to disestablish." Lower Brule Sioux Tribe v. South Dakota, supra, 711 F.2d at 820. The Circuit Court totally ignores its own decision in United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977), in which the statutory reference to the "diminished reservation" was deemed important.

Another example of the Eighth Circuit's piecemeal approach is evident from the fact that several of the factors indicative of an intent to diminish discussed by the Eighth Circuit in the abrogation portion of its decision, are totally disregarded in the diminishment discussion. At no time does

the Eighth Circuit Court of Appeals ever consider the totality of the circumstances in reaching its determination of congressional intent.

Finally, it is not surprising that those "familiar forces" discussed by this Court in Rosebud and DeCoteau are absent from the legislative histories of the Big Bend Act and the Ft. Randall Act. See Lower Brule Sioux Tribe v. South Dakota, 711 F.2d at 818 n.10. The latter two acts are not surplus land acts. The Petitioner contends that the Court of Appeals' misapplication of the Rosebud and DeCoteau guidelines is exacerbated by the fact that the Big Bend and Ft. Randall Acts in question are factually quite dissimilar from the surplus land acts. However, the Eighth Circuit does not take that substantive factual difference into account; instead the Court of Appeals falls into the trap against

which this Court warned in Rosebud. The Eighth Circuit has attempted to make a dissimilar factual situation fit the mold of prior diminishment cases by viewing the factors discussed in those prior cases as "apparent absolutes." The Petitioner therefore respectfully submits that the United States Court of Appeals for the Eighth Circuit has decided an important question of federal law in a manner which conflicts with the applicable diminishment decisions of this Court.

ABROGATION OF TREATY HUNTING AND FISHING RIGHTS

As the Eighth Circuit Court of Appeals recognized in its Lower Brule decision, a resolution of the diminishment issue against the State of South Dakota does not deprive the State of its right to regulate hunting and fishing within the areas taken if the Big Bend Act and the Ft. Randall Act abrogated the Lower Brule tribe's treaty right

to hunt and fish free of state regulation. The District Court had ruled that the Ft. Randall and Big Bend Acts, when considered in conjunction with the Flood Control Act of 1944, did abrogate the tribe's hunting and fishing treaty rights. The Eighth Circuit reversed, finding that the Ft. Randall and Big Bend Acts, while abrogating the treaty right "exclusively own, occupy, and utilize the land," fell short of abrogating hunting and fishing rights. The court instead found that Congress intended only to modify those rights by subjecting the rights to regulation by the Corps of Engineers or Secretary of the Army. Lower Brule Sioux Tribe v. South Dakota, 711 F.2d at 823, 826.

In doing so, the Eighth Circuit purports to rely on this Court's decision in Menominee Tribe v. United States, 391 U.S. 404 (1968). However, the Petitioner respectfully contends that Menominee Tribe, supra,

except to the extent that it states the appropriate canon of construction, is so factually different that the decision is largely inapplicable to the situation presented by the Big Bend and Ft. Randall Acts. Menominee Tribe involved an act of Congress intended to accomplish a total relinquishment of federal supervision over the tribe, which when considered in pari materia with Public Law 280's denial of jurisdiction over hunting and fishing to those states assuming civil jurisdiction, could not be held to abrogate treaty hunting and fishing rights by implication.

Here, however, we have two acts of Congress that specifically deal with hunting and fishing; the tribe is given "permission" to hunt and fish, "subject, however, to regulations governing the corresponding use by other citizens of the United States." Ft. Randall Act, at § 5; Big Bend Act, at

§ 10. There is legislative history clearly indicating the treaty rights were specifically considered in awarding compensation. H.Rep.No. 852, 87 Cong., 1st Sess., 6 (Aug. 5, 1961); H.Rep.No. 2054, 85th Cong., 2d Sess., 4 (June 30, 1958). And foremost, there is the Flood Control Act of 1944, which must be read in pari materia with the Big Bend and Ft. Randall Acts, and which specifically states:

> "No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the state in which such area is situated."

P.L. No. 78-534, 58 Stat. at 887.

Therefore, the petitioner contends that to the extent it is applicable, Menominee Tribe has been misapplied. The Circuit Court did not even attempt to consider the Flood Control Act in pari materia with the taking acts. Instead, the Court of Appeals

considered those Acts separately. Furthermore, the Eighth Circuit does not even address this court's decisions in Puyallup Tribe v. Washington Game Department, 433 U.S. 165 (1977) or in Montana v. United States, 450 U.S. 544 (1981). Here, as in those two cases, the lands in question are no longer owned by the tribe or its members. Nor did the Eighth Circuit consider this Court's decision in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960). See also, Henkel v. United States, 237 U.S. 43 (1915).

Finally, the Eighth Circuit specifically rejected its own precedent of Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), cert. denied, 449 U.S. 905 (1980) which held that statutory language similar to that used in the Big Bend and Ft. Randall Acts abrogated hunting and fishing rights. Petitioner

contends that the Eighth Circuit's erroneous view of the diminishment issue leads to this result. Further, the Eighth Circuit relies on its decision in United States v. White, 508 F.2d 453 (8th Cir. 1974) in reaching its result. However, the Eighth Circuit's abrogation reasoning in United States v. White, supra, has been specifically rejected by the Ninth Circuit in United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980), cert. den. 449 U.S. 984 (1980). Compare, State v. Hero, 282 N.W.2d 70 (S.D. 1979).

Petitioner therefore respectfully submits that the United States Court of Appeals for the Eighth Circuit has decided an important federal question in a manner which conflicts not only with the applicable decisions of this Court, but also with the Eighth Circuit's own precedent on a similar matter.

Because the Eighth Circuit Court of Appeals has ruled on both the diminishment issue and the abrogation issue in a manner which conflicts with the applicable decisions of this Court, the Petitioner respectfully requests that this Petition be granted.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS COURT.

The Eighth Circuit Court of Appeals held that the Flood Control Act of 1944, the Ft. Randall Act and the Big Bend Act could not have conferred exclusive regulatory jurisdiction on the State of South Dakota because those Acts neither diminished the reservation, abrogated tribal treaty hunting and fishing rights, "nor authorized the application of state law to the hunting and

fishing activities of tribal members on the reservation within the taken areas." Lower Brule Sioux Tribe v. South Dakota, 711 F.2d at 827. The Court of Appeals then concluded that "the Lower Brule Sioux retained jurisdiction over tribal hunting and fishing within the land in controversy here, subject only to federal regulation authorized by Congress." Id.

The Petitioner contends that the Eighth Circuit's conclusion on regulatory jurisdiction was influenced by that court's erroneous application of this Court's diminishment and abrogation decisions. Moreover, in reaching that decision the Eighth Circuit for the first time decided a federal question which is of critical importance not only to the State of South Dakota, but to all states impacted by the Flood Control Act of 1944. The Eighth Circuit has in effect held that the Flood Control Act of 1944 is a

scheme of federal regulation which preempts the application of state hunting and fishing laws. Notwithstanding that Congress in § 4 of the Flood Control Act specifically mandated the application of state law, the Eighth Circuit concludes that this does not apply to an Indian tribe. The Eighth Circuit concludes that state jurisdiction is preempted by federal control, but tribal jurisdiction is not.

Congress has expressly provided that state law is to govern the project area for those purposes described in § 4 of the Flood Control Act of 1944. There is no statutory exemption for Indian tribes. In fact, the Ft. Randall Act and Big Bend Act make clear that the Lower Brule Tribe is subject to this statutory requirement. As a matter of federal law, state law applies to these project areas. 16 U.S.C. § 460d. This statute expressly preserves the application

of state game and fish laws and reveals a total lack of intent to preempt state law by direct federal fish and game regulation. Such a federal policy is consistent that policy expressed by Congress in other areas under potentially exclusive federal control. See, e.g., 10 U.S.C. § 2671 (Military Reservations and Facilities); 16 U.S.C. § 528 (National Forest); 16 U.S.C. § 668dd(c) (National Wildlife Refuge System); 16 U.S.C. §§ 670h(b), 670h(c)(4), 670i(b)(4); and 670k(6) (other public lands).

This is not a question of state interference with tribal self-government. See Williams v. Lee, 358 U.S. 217 (1959). Here there is an express act of Congress which in clear terms states that state law controls in the project area. The Eighth Circuit, virtually without citation of authority, turns the statute on its ear, by allowing

tribal members to hunt and fish in total disregard of state law.

Even absent a controlling act of Congress, this Court has recognized that certain hunting and fishing laws have application within the reservation. See Puyallup Tribe v. Washington Game Department, supra; Montana v. United States, supra. The Eighth Circuit does not even address the applicability of those cases. In fact, the situation presented here is the reverse of that situation recently decided by this Court in the New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378 (1983). Here, as a matter of preemption by operation of federal law, the application of South Dakota hunting and fishing laws is specifically required within the taking areas.

Even assuming for the sake of argument that the Eighth Circuit is correct in its assertion that the taking areas are to be

regulated solely by the Corps of Engineers or the Secretary of the Army, Congress has directed that that regulation is not to be inconsistent with state law. There is simply no authority for the Court of Appeal's conclusion that the tribe can regulate its members within this same area in a contrary manner.

This case has a large impact even when limited to the factual situation of state versus tribal regulation of tribal members within the taken areas. Potentially four South Dakota reservations could be effected; unfortunately, there are simply no clear lines of demarcation separating the conflicting zones of jurisdiction which result from the Eighth Circuit's opinion. Moreover, the finding of federal preemption of state hunting and fishing jurisdiction has implications that spread to the total area

taken for a flood control project. The finding of federal preemption cannot be limited to jurisdictional controversies with Indian tribes. If state hunting and fishing jurisdiction is preempted by the Flood Control Act of 1944 then that preemption would arguably apply to all lands taken pursuant to the Act. This would leave a large void of enforcement on the entire upper Missouri River, an area where hunting and fishing laws have been historically enforced by the states. The Corps of Engineers certainly does not regulate hunting and fishing in those areas. It is precisely to avoid such a jurisdictional void that Congress directed the application of state law in the Flood Control Act.

The question of who has regulatory jurisdiction over hunting and fishing in those areas taken pursuant to the Flood Control Act is one of critical importance

not only to the State of South Dakota, but to its Indian tribes as well as the federal government and other affected states with flood control projects. It is an important question which has not been, but should be, considered by this Court. Accordingly, Petitioner respectfully requests that this Petition be granted.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL

Harold H. Deering, Jr.
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215

APPENDIX

APPENDIX A

LOWER BRULE SIOUX TRIBE,

v.

STATE OF SOUTH DAKOTA, Jack Merwin, Secretary, Division of Game, Fish and Parks for the State of South Dakota.

No. CIV 80-3046

United States District Court,
D. South Dakota

April 30, 1983.

MEMORANDUM OPINION

BOGUE, Chief Judge.

The Lower Brule Sioux Tribe brought this action against the State of South Dakota and Jack Merwin, Secretary of the State Department of Game, Fish, and Parks. In its complaint the Tribe seeks declaratory and injunctive relief concerning regulatory jurisdiction over hunting and fishing on the Lower Brule Reservation, 28 U.S.C. §§ 2201, 2202. This Court has jurisdiction over the controversy under 28 U.S.C. § 1362.[1]

---

[1] In order to address potential defects in the Court's jurisdiction over this matter, the Court requested the parties to submit briefs on the issue whether the United States is a necessary or indispensible party to this action under Rule 19 of the Federal Rules of Civil Procedure. The Tribe and the State agreed that the United States was not an indispensible party whose absence would defeat the jurisdiction of this Court. The United States was also invited to respond to the Rule 19 issue. The Government agreed it was not indispensible and declined to assert any of its interests in this controversy.

BACKGROUND

The territory of the Sioux Nation was defined first by the Fort Laramie Treaty of 1851, 11 Stat. 749, and later, by the Second Fort Laramie Treaty of 1868, 15 Stat. 635. See, United States v. Sioux Nation, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980). The Act of March 2, 1889, 25 Stat. 888, divided the Sioux Nation and described the boundaries of the Lower Brule Sioux Reservation. The reservation, generally, was situated in central South Dakota adjacent to and extending westward from the Missouri River. See, Plate 1. The eastern boundary of the reservation was established in "the center of the main channel of the Missouri River," from "Old Fort George," south to "Fort Lookout." The eastern boundary as of 1889 remained in the river even though the reservation was diminished along the western

boundary in 1899, 30 Stat. 1362, and again in 1906, 34 Stat. 124. The General Allotment Act, 24 Stat. 388, authorized the issuance of fee patents to individual Indians covering land within the reservation. Title to some of these parcels eventually passed to non-Indians. Today the Tribe states that land ownership within the reservation is divided among the Tribe, individual allottees, the United States, and both Indian and non-Indian owners of fee land.

Under the 1944 Flood Control Act, P.L. 534-78, 58 Stat. 887, Congress authorized a comprehensive flood control plan which included the construction of several dams and reservoirs on the Missouri River. In order to construct the Big Bend and Fort Randall dam and reservoir projects, Congress authorized the acquisition of tribal and

trust lands belonging to the Lower Brule Tribe, along the eastern boundary of the reservation. Tribal lands needed for the Fort Randall project were taken by the power of eminent domain. Congress enacted P.L. 85-923, 72 Stat. 1773, September 2, 1958, (hereinafter, "the Ft. Randall Taking Act"), to provide compensation to the Tribe and its members for the land taken. On October 3, 1962, Congress enacted P.L. 87-734, 76 Stat. 698, to authorize the acquisition of and payment for tribal and trust lands needed for the Big Bend project. This case, in part, concerns the allocation of regulatory jurisdiction over hunting and fishing within these "taking areas."

The Tribe has adopted various hunting and fishing ordinances to improve management of wildlife resources on the reservation and within the taken areas. These ordinances

were adopted pursuant to the tribal constitution. Some of the ordinances are inconsistent with state laws. For example, the Tribe does not prohibit the use of lead shot or other toxic shot shells by individuals hunting water fowl within the Reservation. The State prohibits the use of lead shot or other toxic shot in this area. In the past, the Tribe and the State have established different water fowl hunting season restrictions affecting the Missouri River and reservoir areas. The State established a Missouri River Refuge in portions of the River which include the Big Bend Reservoir and Lake Sharpe. Since the Tribe alleges that these areas are within Reservation boundaries, the Tribe established its own refuge in the same area and asserts the power to regulate hunting and fishing by all persons. The Tribe seeks to derive income

through fees and licenses arising from its hunting and fishing regulation of the area.

Accordingly, the Tribe requests a declaration by this Court that the State lacks jurisdiction to regulate the hunting and fishing activities of any person within the exterior boundaries of the reservation. The Tribe also seeks to enjoin the State from applying and enforcing its hunting and fishing laws against both members and non-members of the Tribe. Conversely, the State contends that the Lower Brule Reservation was diminished by the 1944 Flood Control Act and by the specific enactments which provided for the acquisition of tribal and trust lands needed for the Big Bend and Fort Randall dam and reservoir projects. The State further asserts that these acts abrogated the 1868 Treaty of Fort Laramie, to the extent that it reserved hunting and fishing rights of the Tribe within the taken

area. Consequently, the State seeks a declaration by this Court that the State has exclusive jurisdiction to regulate hunting and fishing by all persons within the taken area.[2]

Having filed numerous depositions, exhibits and affidavits, both the Tribe and the State assert that there are no genuine issues as to any material fact. Thus, the merits of this case, as it applies to the "taking" areas, are before this Court on the

---

[2] This Court is satisfied that the issue of hunting and fishing regulatory jurisdiction with the taking areas may be resolved by way of summary judgment. The Court is not certain that the same is true of jurisdiction outside the taking areas. Consequently, this Court has bifurcated its resolution of these issues. This Order and Memorandum Opinion will address only the respective powers of the Tribe and the State to regulate hunting and fishing by all persons within the areas taken from the Tribe for the Big Bend and Fort Randall Projects. This Court reserves its ruling on the remaining issues.

parties' cross-motions for summary judgment. The pleadings initially state two issues:

(1) Did the acquisition of tribal and trust lands by the United States, pursuant to the 1944 Flood Control Act, diminish the Lower Brule Reservation and its boundaries to the extent of the taking?

(2) Did the acquisition of these lands abrogate the Lower Brule Sioux Tribe's treaty right to hunt and fish within the area acquired free of State regulation?

RESERVATION DIMINISHMENT

It is well settled that congressional intent controls the determination whether the taking acts diminished the reservation boundaries. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 589, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). The "fact of the Act," the "legislative history," and the "surrounding circumstances" must be examined in

order to determine Congressional intent. Mattz v. Arnett, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973). Doubtful expressions of congressional intent must be resolved in favor of the Indians and against finding reservation diminishment. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 587, 97 S.Ct. at 1362.

This is not the first time this Court has analyzed these taking acts in the context of a claim of reservation diminishment. In United States v. Wounded Knee, 596 F.2d 790 (8th Cir. 1979), cert. denied, 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 289 (1979), the Eighth Circuit Court of Appeals affirmed this Court's decision that the Act which took land of the Crow Creek Sioux Tribe for the Big Bend project did not diminish the Crow Creek reservation.[3] The decision in

---

[3] The Wounded Knee case involved a jurisdictional conflict over a rape offense which

Wounded Knee governs this Court's present inquiry.

The Lower Brule and Crow Creek Tribes occupy reservations on opposite sides of the Missouri River. The tribes, therefore, simultaneously lost land under the taking acts for the Big Bend and Fort Randall projects. On September 2, 1958, Congress enacted nearly identical acts providing for the settlement of all claims of the Crow Creek (P.L. 85-916, 72 Stat. 1766) and Lower Brule (P.L. 85-923) tribes for land taken for the Fort Randall project. Likewise, on October 3, 1962, Congress approved legislation which authorized the taking of both

---

occurred on land taken from the Crow Creek Tribe for the Big Bend project. Since the reservation was not diminished by the taking, the offense was committed in "Indian country." 18 U.S.C. § 1153. Thus, the United States had jurisdiction over the offense.

Lower Brule (P.L. 87-734) and Crow Creek (P.L. 87-735, 76 Stat. 704) lands needed for the Big Bend project. Again, the Big Bend Acts for Lower Brule and Crow Creek are nearly identical, as are the surrounding circumstances and legislative history.

The holding in Wounded Knee was that Congress did not intend the Big Bend Act, P.L. 87-735, to diminish the Crow Creek Reservation. 596 F.2d at 796. In order to determine congressional intent behind P.L. 87-735, however, this Court compared that Act to the Fort Randall Acts for both the Lower Brule and Crow Creek reservations. In its unpublished opinion, at page 5, this Court concluded that the Fort Randall Acts diminished the reservations from which the land was taken. On appeal, the Eighth Circuit agreed.[4] Neither the Tribe, nor the

---

[4] The Eighth Circuit stated, "this act [P.L. 85-916] did contain the phrase "as

State succeeded in stating any argument which compels this Court to reach a different assessment of the taking acts in the present case.

The Fort Randall Acts both contain express language of diminishment. At section 6, both P.L. 85-923 (Lower Brule) and P.L. 85-916 (Crow Creek) provide: "The land selected by and purchased for individual Indians may be either inside or outside the boundaries of the reservation as diminished." [Emphasis supplied.] As part of the surrounding circumstances, the Eighth Circuit observed that Congress included similar language of diminishment in acts which took land for the Oahe Dam and Reservoir project from both the Cheyenne

---

diminished" and did thereby diminish the Crow Creek Sioux Reservation." 596 F.2d at 795.

River and Standing Rock Reservations.[5] 596 F.2d at 792. In the corresponding section of the Big Bend Acts, however, Congress omitted the crucial phrase, "as diminished."

---

[5] See, Act of September 3, 1954, P.L. 83-776, 68 Stat. 1191 (Cheyenne River) at section 11: "The lands so selected. . . may be. . . within the boundaries of the Cheyenne River Reservation as diminished by this agreement. . . . ," Act of September 2, 1958, P.L. 85-915, 72 Stat. 1762 (Standing Rock), which refers to selection of lands either inside or outside the boundaries of the reservation "as diminished."

The Tribe contends this Court should interpret the phrase "as diminished" in the Lower Brule/Fort Randall Act, P.L. 85-923, to refer to prior legislative diminishments of the reservation. The Tribe also states that the presence of the phrase "as diminished," by itself, cannot settle a question of reservation diminishment and cites United States ex rel. Condon v. Erickson, 478 F.2d 684, 687 (8th Cir. 1973). First, it is clear that the decision in Wounded Knee did not rest solely upon the presence or absence of the phrase "as diminished" from any legislation. Second, it is apparent that both this Court and the Eighth Circuit previously interpreted the phrase "as diminished" to refer to the effect of the taking acts, not to prior diminishments in 1899 and 1906. Neither has the Tribe supplied any support for an alternative conclusion that

See, P.L. 87-734 and P.L. 87-735 at section 11.[6] In holding that the Big Bend taking did not diminish the Crow Creek reservation the Eighth Circuit explained:

> Absent some strong indicia we must not assume that Congress carelessly or inadvertently omitted the critical words which it had included in similar previous acts with no intention or awareness that such an omission would result in any consequences. 596 F.2d at 794.

The same conclusion obviously must follow with respect to the Big Bend taking from the Lower Brule Reservation.

---

the phrase refers to a loss of tribal lands within existing boundaries rather than to a geographic reduction of the reservation boundaries. See, United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982, 97 S.Ct. 1677, 62 L.Ed.2d 376 (1977).

[6] The Ninth Circuit recently emphasized the absence of any legislative reference to a "diminished reservation" when it held that allotment legislation did not diminish the Flathead Reservation. Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982).

Beyond the express language of diminishment, there are other statements on the face of the acts which persuade this Court that Congress intended to diminish the Lower Brule Reservation to the extent of the Fort Randall taking but not by the Big Bend taking. At section 1(a), both Big Bend Acts, P.L. 87-734 and P.L. 87-735 describe the interest taken as "any interest the Tribe or Indians may have within the bed of the Missouri River so far as it is within the boundaries of the reservation. . . ." [Emphasis supplied.] The Big Bend Act take-line lies well beyond the limits of the riverbed. See, Plate 2. Thus, language asserting the possible continued location of the riverbed within reservation boundaries would be inconsistent with congressional intent to diminish the reservation boundary to the full extent of the Big Bend taking.

Furthermore, the Big Bend Act contains a timber removal provision which authorizes the Indians to remove timber and improvements from the taken lands "on the reservation." P.L. 87-734, at section 9. The timber removal provision in the Fort Randall Act omits the phrase "on the reservation." P.L. 85-923, at section 4. Finally, the Big Bend Act, P.L. 87-734, section 12, provides for reimbursement of tribal expenses "incurred in connection with the taking of Indian lands within the reservation for the Big Bend project." [Emphasis supplied.] The reimbursement provision in the Fort Randall Act omits the phrase "within the reservation." P.L. 85-923, section 8.[7]

---

[7] This Court has also considered, and must reject the Tribe's argument that Congress indicated its intent not to diminish the reservation by the Fort Randall taking when

Although the legislative history of the acts provides little guidance concerning the diminishment issue, the Eighth Circuit summarized some of the surrounding circumstances which support the conclusion that Congress intended to diminish the Lower Brule Reservation by the Fort Randall taking but not by the Big Bend taking. 596 F.2d. at 795. It is true that the Eighth Circuit's comments were directed solely to the Crow Creek Reservation. Nonetheless, the record in these cases shows that the circumstances surrounding the Big Bend taking from the Lower Brule and Crow Creek Tribes were nearly identical. The State, however,

---

it reserved to the Tribe a beneficial interest in the oil and gas within the taken areas. The fact that a beneficial interest is retained does not preclude a finding that the boundaries of the reservation were diminished. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 601, n. 24, 97 S.Ct. at 1370, n. 24.

repeats an argument made by the defendants in Wounded Knee, based upon its view of the surrounding circumstances. The State contends that notwithstanding the absence of diminishment language from the Big Bend Act, Congress must have intended to diminish the reservation by the Big Bend taking. Throughout the history of takings pursuant to the 1944 Flood Control Act, the State claims that Congress showed its intent to treat equally all affected Indian tribes. The State concludes that there was no reason for Congress to treat the Lower Brule Tribe differently than it had treated other reservations in previous acts where Congress did explicitly diminish the reservation. This argument, deemed "ingenious" by the Eighth Circuit was soundly rejected. 596 F.2d at 793. The surrounding circumstances supply

plausible explanations for Congress' decision not to diminish the Lower Brule Reservation to the extent of the Big Bend taking.

Finally, this Court has considered the jurisdictional history of the taking areas. The State has traditionally claimed the exclusive power to regulate hunting and fishing by all persons in the taken areas. Accordingly, the record shows that the State has enforced its laws against both Indians and non-Indians. Although the current position of the Corps of Engineers is not a matter of record, in March, 1976, the Corps believed that the Tribe had no regulatory jurisdiction over hunting and fishing within the taking areas.[8] The Tribe has never

---

[8] See, Letter from Russell A. Glenn, District Engineer, to Michael B. Jandreau, Tribal Chairman (March 9, 1976).

abandoned its claim to regulatory jurisdiction. Due to the uncertainty in the law, however, the Tribe has acquiesced in the State's assertion of regulatory authority, both prior to and during the pendency of this action. The Tribe apparently is now willing to concede that the State has concurrent jurisdiction with the Tribe to regulate hunting and fishing, by all persons, within the taking areas.[9] Thus, the jurisdictional history of the area remains disputed. Unlike the record in Wounded Knee, however, the jurisdictional history in this case does not clearly "militate against a finding of diminishment." 596 F.2d at 795. For the foregoing reasons, this Court concludes that Congress intended to and did diminish the Lower Brule Reservation to the

---

[9] See, Tribe's Reply to Defendant's Amended Response to Plaintiff's Motion for Summary Judgment," at 7 and 18.

extent of the taking for the Fort Randall Dam and Reservoir project. Congress, however, did not intend to diminish the Reservation to the extent of the Big Bend taking.

ABROGATION OF TREATY RIGHTS

The State contends that even if the taking areas lay in whole or in part within the exterior boundaries of the Lower Brule Reservation, Congress abrogated or modified the hunting and fishing rights of the Tribe within the taken areas. By enacting the 1944 Flood Control Act, P.L. 85-923 and P.L. 87-734, the State further contends that Congress abrogated all regulatory jurisdiction of the Tribe within the taken areas. The State concludes that Congress conferred exclusive jurisdiction upon the State to regulate hunting and fishing by all persons within the taken areas. The Tribe disagrees.

The 1868 Treaty of Fort Laramie, at Article II, provides that the lands of the Lower Brule Reservation were ". . . set apart for the absolute and undisturbed use and occupation. . ." of the Tribe. The Treaty thereby reserved to the Tribe exclusive and unrestricted hunting and fishing rights within the Reservation. These treaty rights ordinarily are implied from a reservation of land for the exclusive use of a tribe. See, Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968); State v. Hero, 282 N.W.2d 70 (S.D. 1979); D. Getches, D. Rosenfelt, and C. Wilkinson, Federal Indian Law: Cases and Materials, at 618 (1979).

Nonetheless, Congress has the power unilaterally to abrogate treaty-reserved hunting and fishing rights. United States v. White, 508 F.2d 453, 456 (8th Cir. 1974).

A treaty may be abrogated by a subsequent, superseding act of Congress. Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903); Head Money Cases, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884). Rights secured by treaty, however, will not be deemed abrogated or modified absent a clear expression of congressional purpose. United States v. Winnebago, 542 F.2d 1002, 1005 (8th Cir. 1976). The intention to abrogate a treaty "is not to be lightly imputed to Congress." Menominee Tribe v. United States, 391 U.S. at 413, 88 S.Ct. at 1711. To support its claim that Congress intended to abrogate or modify the Tribe's treaty hunting and fishing rights within the taken areas, the State cites the language and legislature history of the 1944 Flood Control Act, P.L. 85-923 and P.L. 87-734.

1. THE 1944 FLOOD CONTROL ACT

The Flood Control Act was general legislation which authorized the construction of a series of dams and reservoirs on the Missouri River. 58 Stat. 887, December 22, 1944. The dams and reservoirs at Big Bend and Fort Randall were part of this comprehensive flood control plan for the Missouri River Basin. Section 4 of the Act is central to the State's claim of treaty abrogation. Section 4 provides, in pertinent part:

> The water areas of all such reservoirs shall be open to public use generally, without charge, for . . . fishing and other recreational purposes . . . . No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated.

This section is now codified at 16 U.S.C. § 460d. The State argues that the 1944 Act,

§ 4, is a general law, which by its terms renders all persons within the taken areas subject to state regulations for hunting and fishing. The Act, therefore, would abrogate the treaty rights of the Tribe to hunt and fish in the areas exclusively and free of state regulations.

When Congress opened to public use the dam and reservoir areas it clearly abrogated whatever remained of the Tribe's right to exclusive use and occupation of those portions of the taken land which remain within reservation boundaries. See, Montana v. United States, 450 U.S. 544, 558-561, 101 S.Ct. 1245, 1254-1256, 67 L.Ed.2d 493, 506-507 (1981). More important to this case, however, is the provision of section 4 which makes the use of the taken areas by all persons generally subject to state game and fish laws.

In a persuasive dissent in United States v. White, Judge Lay concluded that treaty-based hunting and fishing rights are Indian property rights which may be abrogated by a general law, which by its terms applies to all persons. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960). Thus, Judge Law would have held that the treaty hunting rights of the Red Lake Band of Chippewa Indians were abrogated or modified by 16 U.S.C. § 668(a), which proscribes the unlawful taking of a bald eagle. He disagreed with the majority opinion in White, which held that the Eagle Protection Act could not abrogate treaty rights absent an express reference, in the Act or its legislative history, to modification of the treaty right to hunt eagles. 508 F.2d at

457-458.[10] The Ninth Circuit Court of Appeals recently addressed the same issue raised in White. The court disagreed with the White majority and followed Judge Lay's dissenting opinion concerning the effect of the Eagle Protection Act upon treaty hunting rights. United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980), cert. denied, 449 U.S. 1004, 101 S.Ct. 545, 66 L.Ed.2d 301 (1980).

The 1944 Flood Control Act, § 4, could also be found to have abrogated treaty hunting and fishing rights, if the White dissent and Fryberg stated the governing rule in this Circuit. They do not. Instead, the Eighth Circuit requires more

---

[10] The decision in White has been cited in support of a rule requiring express legislative action to abrogate Indian treaty rights. C. Wilkinson & J. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, or Grass Grows Upon the Earth"--How Long A Time is That? 63 Cal. L. Rev. 601 (1975).

specific reference to the Tribe and its treaty rights. Although the 1944 Flood Control Act, § 9(c), refers to irrigation of Indian trust or tribal lands, the Act does not refer to the Lower Brule Tribe, to its treaties, or to its hunting and fishing rights.[11] Thus, this Court must conclude

---

[11] To support its claim of abrogation, the State cites a portion of the legislative history of the 1944 Act. H.Doc. No. 475, 78th Cong. 2d Sess., page 4, is a letter sent by the Chief of Engineers to the Chairman of the Committee on Flood Control of the House of Representatives. The letter acknowledges that the "proposed reservoirs will inundate Indian lands at several points." Id. The letter also states that approval of the plan for the improvement of the Missouri River includes the authority for the Indians to convey their property to the Government and to receive just compensation. This letter was considered by the Eighth Circuit in United States v. Winnebago Tribe, 542 F.2d at 1005-1006. The court concluded the letter failed to indicate the clear intent of Congress, under the 1944 Flood Control Act to abrogate the Treaty of 1865, to permit the taking of Winnebago Indian tribal lands by eminent domain. Accord, United States v. 2,005.32 Acres of Land, 160 F.Supp. 193 (D.S.D. 1958), vacated as moot, 259 F.2d 271 (8th Cir. 1958).

that the 1944 Flood Control Act does not evince the clear intent of Congress to abrogate or modify the reserved treaty hunting and fishing rights of the Lower Brule Tribe. This Court reaches a different conclusion, however, with respect to the specific acts which authorized the taking of and settlement for tribal and trust lands of the Tribe.

2. THE TAKING ACTS

By the Act of July 6, 1954, Congress authorized the negotiation and ratification of an agreement with the Lower Brule Tribe for the acquisition of land needed for the Fort Randall project. P.L. 478, 68 Stat. 452. Under the proposed agreement Congress sought to acquire "all tribal, allotted, assigned, or inherited lands or interests therein belonging to the Indians of the tribe. . . ." P.L. 478, § 2(a). Negotiation failed to supply an agreement with the

Tribe. On January 21, 1955, therefore, a declaration of taking was filed in condemnation proceedings, which vested in the United States fee title to 7,997 acres, subject only to a reservation of the Indians' oil and gas rights. The Tribe received some compensation in these proceedings, and P.L. 85-923 later authorized additional compensation for tribal and trust lands thereby taken.

The State asserts that the language of both P.L. 85-923 (Fort Randall taking) and P.L. 87-734 (Big Bend taking) establish the clear intent of Congress to abrogate the Tribe's treaty hunting and fishing rights within the taken area. Specifically, P.L. 85-923, § 1, constituted the "settlement of all claims, rights, and demands of [the Lower Brule Tribe] and its members arising out of the construction of the Fort Randall project." Likewise, by P.L. 87-734, § 1(a),

Congress took "the entire interest, including gravel, but excluding the interest in oil, gas, and all other minerals . . . and any interest the tribe or Indians may have within the bed of the Missouri River. . . ." The legislative history for both taking acts repeats express statements of Congress' intent to take "the entire outstanding interest" of the Tribe and its members in the acquired land. See, e.g., H.Rep. No. 852, 87th Cong., 1st Sess., at 7.

It has been held that statutes which remove "all right title and interest" of a tribe in certain land operate to extinguish treaty hunting and fishing rights in the land. See, Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), cert. denied, 449 U.S. 905, 101 S.Ct. 279, 66 L.Ed.2d 136 (1980); State v. Hero, supra. Thus, it may be that this language on the

face of the acts constitutes sufficient indicia of congressional intent to extinguish treaty hunting and fishing rights of the Tribe within the taken area. There are, however, other statements in the acts and legislative history which satisfy even the strict treaty abrogation standard set out in United States v. White.

Congress understood and intended that by taking the Tribe's "entire interest" it was extinguishing interests and rights reserved by treaty. In H.Rep.No. 852, at 6, the purposes of P.L. 87-734 are identified: "The principal purposes . . . are to reimburse individual Indian[s] . . . and the . . . Tribe . . . for the trust lands acquired . . . [and] to compensate the tribe and its members for treaty and tribal damages. . . ." [Emphasis supplied]; see also, S.Rep.No. 1636, 87th Cong., 2d Sess., at

page 5. Congress included within the scope of the taking under the acts "any interest the tribe or Indians may have within the bed of the Missouri River. . . ." Accompanying the bill which became P.L. 85-923 was the report of the Committee on Interior and Insular Affairs, which stated:

> The Lower Brule and Crow Creek Reservations include approximately 10,158 acres in the bed of the Missouri River. . . . The Committee deemed it in the overall interest that this acreage be removed from tribal ownership to prevent jurisdictional disputes and conflicts which would arise from exercise of treaty rights. H.Rep.No. 2054, 85th Cong., 2d Sess., at page 5.

The same committee later reported that acquisition of the entire interest of the Tribe in the riverbed was also intended "to insure complete control of the project." H.Rep.No. 852, supra, at page 9. Thus, the taking acts and the legislative history specifically refer to the abrogation of

treaty rights within the taken areas. The acts also expressly refer to the hunting and fishing rights of the Tribe and its members following the taking.

P.L. 85-923, § 5,[12] provides that the Tribe and its members "shall be permitted to have, without cost, access to the shoreline of the reservoir including permission to hunt and fish in and on the . . . reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States." [Emphasis supplied.] P.L. 87-734, § 10, likewise provides that the "right" of tribal members to hunt and fish within the Big Bend taking area is "subject. . . to regulations governing the

---

[12] Obviously, if Congress did not intend to abrogate treaty hunting and fishing rights, it would have been unnecessary for Congress to grant its permission for such a use by the Tribe of the taken areas.

corresponding use by other citizens of the United States." The legislative history clarifies Congress' intent behind this provision.

The report of the Committee on Interior and Insular Affairs noted that the original draft of H.R. 5144 (which became P.L. 87-734) would have conferred upon tribal members the right "to hunt and fish . . . on the reservoir without regard to State law, but subject to regulations of the Secretary of the Interior regarding migratory waterfowl and to regulations of the Secretary of the Army regarding access." H.Rep.No. 852, supra, at pages 21, 26. [Emphasis supplied.] The Army Corps of Engineers opposed this provision because it permitted "uncontrolled hunting and fishing . . ." by tribal members within the taken areas. Id. at page 17. The Secretary of the Army also objected

to the provision because it excluded "the exercise of jurisdiction by the States of hunting and fishing within the reservoir areas." Id. at page 31. To remedy this defect, the Secretary proposed the amendment of H.R. 5144 to provide that hunting and fishing by members, within the taken areas would be "subject . . . to regulations governing the corresponding use by other citizens of the United States." Id. at page 33. Obviously, H.R. 5144 was so amended. Thus, Congress enacted P.L. 87-734, including the provision urged by the Secretary, and omitting the prior provision for member hunting and fishing "without regard to State law." The final content of P.L. 87-734, therefore, is consistent with the general provision of Congress concerning the operation of dams and reservoirs authorized by the 1944 Flood Control Act: "No use of any

area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is located." 16 U.S.C. § 460d.

This Court concludes that the taking Acts meet the standard for treaty right abrogation recognized in United States v. White. Together, the acts and legislative history establish: (1) Congress knew and intended Lower Brule treaty rights would be abridged by the taking of tribal and trust lands. (2) P.L. 85-923 and P.L. 87-734 specifically refer to the hunting and fishing "rights" of the Tribe and its members within the taken areas. (3) The Acts expressly state that the hunting and fishing rights of the Tribe within the taken areas, rights once exclusive and unrestricted, are

now subject to regulation, including applicable state law. Accordingly this Court holds that Congress intended to and did abrogate the treaty hunting and fishing rights of the Tribe within the taken areas. The present hunting and fishing "rights" or privileges" of the Tribe within the taken areas are conferred by P.L. 85-923 and P.L. 87-734, and are subject to the limitations established therein pursuant to the general plan authorized by the 1944 Flood Control Act.[13]

---

[13] H.Rep.No. 852, supra at page 8, states that the restricted right to hunt and fish within the taken area was among the "rights or privileges" conferred upon members by the bill which became P.L. 87-734. It would be meaningless for Congress to confer restricted hunting and fishing rights upon members if Congress did not intend to abrogate the Tribe's treaty right to exclusive and unrestricted hunting and fishing within the taken areas. Thus, the present hunting and fishing rights of the Tribe within the taken areas no longer derive from the 1868 Treaty and are no longer superior to the rights of other United States citizens.

REGULATORY JURISDICTION WITHIN THE TAKEN AREAS

From the foregoing, this Court must conclude that Congress conferred upon the State the exclusive power to regulate hunting and fishing by all persons within the taken areas. This conclusion is based primarily upon the express statements of congressional intent found in the acts and legislative history. The conclusion is also based upon the Court's analysis of applicable case law, set forth in the remainder of this opinion. Finally, this Court has considered, in the course of discovering congressional intent, the jurisdictional confusion and enforcement problems which would arise from alternative solutions to the regulatory jurisdiction issue.

For example, the location of a reservation boundary is one factor which affects

the jurisdiction of a tribe and a state. Originally, the center of the old main channel of the Missouri River marked the eastern boundary of the Lower Brule Reservation. This single boundary line created sufficient jurisdictional confusion because the center of the main channel of the river is nearly impossible to identify or mark with precision. The confusion in this case was compounded by the two separate taking of tribal lands and by the decision compelled by Wounded Knee concerning the effect of those takings upon the Reservation boundaries.

Plate 2 shows the relationship between the land acquisitions from the Lower Brule and Crow Creek Reservations, north of the Big Bend Dam. The dark center strip represents the land taken from the Lower Brule and Crow Creek Tribes for the Fort Randall project. P.L. 85-923, P.L. 85-916. Lands

taken south of the "East Limit" line are also included within the Fort Randall taking. The Wounded Knee decision compels the conclusion that the Fort Randall taking areas are no longer within reservation boundaries. 596 F.2d at 795. The lighter shaded area on Plate 2 represents the lands taken from the Lower Brule and Crow Creek Tribes for the Big Bend project. P.L. 87-734, 87-735. Wounded Knee compels the conclusion that these lands are still within the exterior reservation boundaries. 596 F.2d at 796. Thus, the eastern exterior boundary of the Lower Brule Reservation would be the line between the Big Bend and Fort Randall takings on the Lower Brule side of the river. In Wounded Knee, however, the Eighth Circuit correctly observed that the taking areas for the Fort Randall and Big Bend projects overlap. 596 F.2d at 795, n.

8. Thus, although no court should assume that Congress intended "to change [a] reservation to an area without defined boundaries . . .," United States v. Long Elk, 565 F.3d 1032, 1039 (8th Cir. 1977), the decision in Wounded Knee appears to recognize precisely that situation.

Accordingly, for jurisdictional purposes, there are several potential "zones" of jurisdiction within the taken areas. In some locations, moving from west to east across the taken areas, there may be at least four "zones": these are the Lower Brule/Big Bend taking, the Lower Brule/Fort Randall taking, and the Crow Creek/Fort Randall taking, and the Crow Creek/Big Bend taking. Apart from the express language of the Acts, and under some interpretations of applicable law, non-Indians and Indians alike could be subject to differing regulations and authorities depending upon the

"zone" in which they happened to be hunting or fishing. Since it is impossible to identify the boundaries of these zones, either on land or on the surface of the reservoirs, it is also impossible for either the Tribe or the State to enforce their hunting and fishing laws against violators. The situs of the violation could be an issue in nearly every enforcement attempt, and neither the Tribe nor the State would be assured that it could prove that the violation occurred within the geographic limits of their jurisdiction. The express language of the 1944 Flood Control Act, and the taking Acts, assures this Court that Congress did not intend such a jurisdictional nightmare when it took the entire interest of the Tribe in these lands and opened the reservoir areas to public use.

REGULATION OF TRIBAL MEMBER[14] HUNTING AND FISHING WITHIN THE TAKEN AREAS

The Tribe originally claimed exclusive jurisdiction to regulate hunting and fishing within the entire taken area west of the center of the main channel of the River. The Tribe's latest memorandum indicates, however, that it now concedes that the State should have concurrent jurisdiction with the Tribe to regulate hunting and fishing by all persons on the River. The State asserts exclusive jurisdiction over hunting and

---

[14] Most courts use the term "non-member" rather than "non-Indian." Indians who are not members of the Lower Brule Tribe stand on the same footing as non-Indians with regard to hunting and fishing on the Reservation. See, Washington v. Coville, 447 U.S. 134, 160, 100 S.Ct. 2069, 2085, 65 L.Ed.2d 10 (1980); White Earth Bank of Chippewa Indians v. Alexander, 518 F.Supp. 527, 534, n. 3(1981). The taking Acts in this case also refer to the rights or privileges of the Tribe and its members.

fishing within the area taken from the Tribe pursuant to the 1944 Flood Control Act.

The regulatory jurisdiction of the State over member hunting and fishing within the Fort Randall taking area must be exclusive. This taking area is outside the exterior boundaries of the Lower Brule Reservation. The Tribe does not claim off-reservation treaty hunting and fishing rights. No provision in the applicable treaties or statutes may be viewed to create such rights. See, e.g., Puyallup Tribe v. Department of Game of State of Washington, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); Tulee v. Washington, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974), cert. denied, 419 U.S. 1019, 95 S.Ct. 491,

42 L.Ed.2d 292 (1974). Having held that Congress abrogated the Tribe's treaty hunting and fishing rights within all of the taken areas, this Court must also conclude that the Tribe retains no special hunting and fishing rights upon land that is no longer reservation. State v. Hero, 282 N.W.2d 70 (S.D. 1979). Thus, the applicable rule was stated in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149, 93 S.Ct. 1267, 1270-1271, 36 L.Ed.2d 114 (1973): "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."

Whether the State may exclusively regulate member hunting and fishing within the Big Bend taking area is a more difficult question. This area is within the boundaries

of the Lower Brule Reservation. Ordinarily, "[a] federal statute, treaty, or agreement setting aside a reservation for the use and occupation of a tribe is necessarily preemptive of state jurisdiction over Indian hunting and fishing activity on the reservation," Getches, et al., Federal Indian Law: Cases and Materials, supra, at 618; State v. Clark, 282 N.W.2d 902, 909 (Minn. 1979). So long as the relevant treaties or statutes do not extinguish aboriginal tribal hunting and fishing rights, the members' right to hunt or fish free of state regulation is viewed as an incident of reservation status. White Earth Band of Chippewa Indians v. Alexander, 518 F.Supp. 527, 534 (D. Minn. 1981).

This Court has held, however, that Congress abrogated the provision of the 1868 Treaty which reserved the Big Bend taking area of the reservation for the Tribe's exclusive use and occupation. The Tribe

cannot, therefore, rely upon this provision of the treaty (Article II) as a source of the members' right to hunt or fish in this area free of State regulations. This Court also held that Congress abrogated the Tribe's treaty hunting and fishing rights within the Big Bend taking area. Thus, the Tribe cannot rely upon the reservation status of the area as a source of the members' right to hunt and fish free of State regulation.

It clearly is within the power of Congress to provide that the laws of a state shall apply to triabl Indians even with respect to conduct occurring on a reservation. Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); McClanahan v. State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). Although a tribe's hunting and fishing rights are subject in

the first instance only to federal regulation, Congress may further restrict tribal rights by conferring on a state powers inconsistent with unrestricted tribal rights. See F. Cohen, Handbook of federal Indian Law, at 117, 286 (U.N.M. ed. 1971). Within the limited area of the reservation occupied by the Big Bend taking, this Court concludes that Congress intended Lower Brule member hunting and fishing to be subject to State regulation.[15]

The express language of the 1944 Flood Control Act establishes that Congress intended all citizens hunting and fishing within the boundaries of the public park and recreational facilities at dam and reservoir

---

[15] The State makes no claim that it may regulate member hunting and fishing on tribal or trust lands elsewhere within the reservation.

projects to be subject to the same, uniform hunting and fishing regulations, including state game and fish laws. 16 U.S.C. § 460d. To accomplish this end, Congress abrogated the Tribe's treaty hunting and fishing rights within the taken areas. Congress deleted a provision in a draft of P.L. 87-734 which would have permitted member hunting and fishing "without regard to state law." And Congress conferred upon tribal members the restriced right to hunt and fish within the taken areas "subject to regulations governing the corresponding use of other citizens of the United States." State hunting and fishing regulations clearly are among the laws which govern the conduct of other citizens within the taken areas.

This Court cannot hold that federal law preempts the application of State hunting and fishing regulations to tribal members.

The taken areas are subject to federal regulation under a statute which governs the operation of public parks and recreational facilities at water resource development projects. 16 U.S.C. § 460d. This statute expressly preserved the application of state game and fish laws and reveals a total lack of intent to preempt State law by direct federal fish and game regulation. Federal law governing the dam and reservoir projects is totally consistent with Congress' express preservation of state fish and game regulation in other areas under potentially exclusive federal control. See, e.g., 10 U.S.C. § 2671 (military reservations and facilities); 16 U.S.C. § 528 (national forests); id. § 670h(b) and (c)(4), 670i(b)(4), 670k(6) (other public lands). Even within these areas, if Congress intended not to extinguish Indian treaty rights, it knew how to do so. In 10 U.S.C.

§ 2671(d) (military reservations), Congress provided that "[t]his section does not modify any rights granted by treaty or otherwise to any Indian tribe or to the members thereof." Congress declined to so preserve the treaty hunting and fishing rights of the Lower Brule Tribe within the taken areas.[16]

Furthermore, this Court cannot hold that State regulation of member hunting and fishing infringes upon the right of tribal self-government. In Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d

---

[16] Congress also knew how to reserve treaty hunting and fishing rights upon tribal lands which were ceded or removed from reservation status, but did not do so in this case. Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979); Antoine v. Washington, 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); Kimball v. Callahan, 590 F.2d 768 (9th Cir. 1979).

251 (1959), the Supreme Court states: "[e]ssentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." This "infringement" test, however, need not be reached in a case in which a congressional act controls. Getches, et al., Federal Indian Law: Cases and Materials, supra, at 287. This Court holds that the 1944 Flood Control Act and P.L. 87-734 constitute governing acts of Congress with respect to member hunting and fishing within the Big Bend taking area on the Reservation. Congress has determined that the right of tribal self-government in the area taken for the dam and reservoir projects does not include the right of tribal members to hunt and fish free of State regulation.

In summary, this Court is well aware of general principles in Indian law which properly limit the reach of state authority in Indian country. But Wounded Knee compels the conclusion that Congress changed the Reservation to an area without defined or identifiable boundaries. To avoid the corresponding jurisdictional confusion over hunting and fishing, Congress provided that tribal hunting and fishing rights, within the entire taken area, were subject to the same regulations which govern the corresponding use of other citizens of the United States. This Court will not adopt a contrary, strained interpretation of the acts which defeats Congress' clear intent to establish uniform federal and state regulation of hunting and fishing by all persons

within the areas taken from the Lower Brule Tribe.[17]

REGULATION OF NON-MEMBER HUNTING AND FISHING WITHIN THE TAKEN AREAS[18]

This Court has held that the fact of the relevant Acts, together with the legislative history, establishes that Congress intended the State to exercise exclusive

---

[17] The policies against the confused patter of jurisdiction described earlier in this opinion are so strong that the Supreme Court indicated such an impractical result is not to be imputed to Congress without specific language to that effect. See, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 478, 96 S.Ct. 1634, 1643, 48 L.Ed.2d 96 (1976); Seymour v. Superintendent, 368 U.S. 351, 358, 82 S.Ct. 424, 428, 7 L.Ed.2d 346 (1962); United States v. Long Elk, 565 F.2d at 1039, n. 12. Specific language recognizing indiscreet jurisdictional boundaries on land or water, for hunting and fishing regulation, is absent from the relevant Acts.

[18] In order to establish regulatory jurisdiction over the area, the Tribe and the State made competing claims to ownership of the bed of the Missouri River. The same issue was raised in other Indian cases concerning regulatory jurisdiction. See,

regulatory jurisdiction over hunting and fishing by all persons within the taken areas. Beyond the language of the Acts, however, the exclusive jurisdiction of the State over non-member hunting and fishing is supported by reference to otherwise applicable principles of law.

First, there can be no dispute that the State's jurisdiction over non-members within the Fort Randall taking area is exclusive. This taking area is outside the exterior

---

Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982); State of Wisconsin v. Baker, 524 F.Supp. 726 (W.D. Wis. 1981); Puyallup Tribe v. Port of Tacoma, 525 F.Supp. 65 (W.D. Wash. 1981). It is clear, however, in this case, that the United States intended to and did acquire any interest of the Tribe within the bed of the River. Further, for the reasons set out in this opinion, the Court can determine the extent of the regulatory jurisdiction of the Tribe and the State in this area without reference to or ruling upon the ownership of the riverbed.

boundaries of the Lower Brule Reservation and the Tribe makes no claim that its laws could apply outside Reservation boundaries. The issue of state jurisdiction over non-members within the Big Bend taking area, on the Reservation, is more complex.

It is generally recognized that a state law has jurisdiction to enforce its hunting and fishing laws with respect to non-members within the boundaries of a reservation unless precluded by an act of Congress or unless such enforcement would interfere with tribal self-government on the reservation. Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89 (9th Cir. 1979); United States v. Sanford, 547 F.2d 1085, 1089 (9th Cir. 1976); State v. Danielson, 427 P.2d 689, 692-693 (Mont. 1967); United States v. Montana, 604 F.2d 1162, 1171 (9th Cir. 1979), reversed on other grounds, 450 U.S. 544, 101 S.Ct. 1245,

67 L.Ed.2d 493 (1981). No act of Congress precludes State jurisdiction over non-members in this case.[19] This Court further concludes that exclusive State jurisdiction over non-members does not infringe upon tribal self-government.

The United States acquired fee title to the land taken for the Big Bend project. P.L. 87-734. The lands are no longer tribal

---

[19] It is true that the State, upon entering the Union, agreed to disclaim certain rights and interests in Indian land and agreed that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." South Dakota Enabling Act, § 4, 25 Stat. 676. See also, South Dakota Constitution, Article XXII. This disclaimer, however, does not operate to preclude the State from regulating non-member hunting and fishing on a reservation. White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1280 (9th Cir. 1981). The Enabling Acts required states to disclaim their proprietary interest in Indian land but not their governmental or regulatory authority over their land. Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 566-567, 7 L.Ed.2d 573 (1962).

or trust lands. The United States opened these lands to public use consistent with the general purposes of the dam and reservoir projects. Thus, the status of these lands is identical to that of non-member-owned fee land. In Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), the Supreme Court held that the Crow Tribe had no power to regulate non-member hunting and fishing on lands owned in fee by non-members. The Court stated that the dependent status of Indian tribes implicitly divested them of powers over relations with non-Indians. The "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 101 S.Ct. at 1257. The Court rejected the

Crow Tribe's claims of jurisdiction over non-members based upon the 1868 Treaty of Fort Laramie, the federal trespass statute, 18 U.S.C. § 1165, and the doctrine of inherent tribal sovereignty.

Following the decision in Montana v. United States, the Court vacated the Tenth Circuit's decision in Mescalero Apache Tribe v. New Mexico, 630 F.2d 724 (10th Cir. 1980), vacated and remanded, 450 U.S. 1036, 101 S.Ct. 1752, 68 L.Ed.2d 234 (1981), that the State of New Mexico could not apply its hunting and fishing laws to any person on the reservation. Following the Montana decision, other courts recognized the exclusive authority of a state to regulate non-member hunting and fishing activities on non-Indian lands within a reservation. White Earth Bank of Chippewa Indian v. Alexander, 518 F.Supp. 527 (D.Minn. 1981); State of Wisconsin v. Baker, 524 F.Supp. 726 (W.D.Wis.

1981); Ute Indian Tribe v. State of Utah, 521 F.Supp. 1072 (D.Utah 1981).

The Supreme Court, however, recognized some exceptions to the rule of implied divestiture of tribal powers over non-member conduct. "A tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or the welfare of the tribe." Montana v. United States, 101 S.Ct. at 1258.[20]

---

[20] The Supreme Court recognized a second exception to exclusive state jurisdiction over non-member conduct on non-Indian owned fee land. "A tribe may regulate . . . the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing contracts leases or other arrangements." Montana v. United States, 101 S.Ct. at 1258. The Court rejected any suggestion, however, that non-Inidans who hunt or fish on non-Indian fee land enter any consensual agreements or dealings with a tribe. Id.

Responding to this exception, some courts recognized tribal powers to enforce against non-Indians a tribe's building, health and safety regulations, Cardin v. De La Cruz, 671 S.2d 363 (9th Cir. 1982), tribal ordinances governing riparian rights of non-Indian landowners, Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), and tribal regulations governing the right to use scarce water resources on a reservation. Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981). Significantly, the challenged conduct in each of these cases was not subject to state regulation. Thus, the threatening conduct would continue unregulated if tribal authority had been divested. The potential danger to tribal political or economic security, health or welfare, was both clear and significant. Non-member hunting or fishing within the Big Bend

taking area does not threaten the political or economic security, health or welfare of the Tribe. Non-member hunting and fishing in this area is subject to comprehensive federal and state regulation. No credible claim can be made that non-member fishing in the reservoirs so depletes resources needed for tribal subsistence, as to require the additional imposition of tribal regulations. The Tribe has not alleged that the State inadequately regulates non-member conduct and so impairs the Tribe's remaining rights in these areas. This Court finds and concludes that non-member hunting and fishing within the Big Bend taking area bears no clear relationship to the self-government or political integrity of the Tribe. The record shows that since the construction of the Big Bend and Fort Randall projects, the Tribe has accommodated itself to State regulation of non-members within the entire

taken areas. See, Montana v. United States, 101 S.Ct. at 1258.

This Court acknowledges the efforts of the Tribe to develop hunting and fishing reserves as a means of conserving resources and raising revenue. Undoubtedly, this decision will affect the ability of the Tribe to utilize hunting and fishing within the taken areas as a means of economic development. But the Tribe has no vested right to the revenue it might derive from the enforcement of its laws with respect to non-member hunting and fishing within the Big Bend taking area. White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1284 (9th Cir. 1981). This Court concludes that Congress restricted the rights or privileges of the Tribe within the taken areas consistent with its plan to maintain the areas under primary federal regulations for public uses and purposes.

Accordingly, the Court declares that:

1) The Lower Brule Sioux Reservation, as established by the 1868 Fort Laramie Treaty and the Act of March 2, 1889, 25 Stat. 888, was diminished to the extent of the United States' acquisition of tribal and trust lands for the Fort Randall Dam and Reservoir project, P.L. 85-923; the Reservation was not diminished to the extent of the taking of tribal and trust lands for the Big Bend Dam and Reservoir project, P.L. 87-734.

2) Congress abrogated the 1868 Treaty to the extent that the treaty reserved to the Tribe and its members within the Fort Randall and Big Bend taking areas, (a) the right to exclusively use and occupy the areas, and, (b) the right to hunt and fish in the areas free of State regulation.

3) Pursuant to the authority recognized in the taking Acts, P.L. 85-923 and P.L. 87-734, and granted by the 1944 Flood

Control Act, 16 U.S.C. § 460d, the State has exclusive jurisdiction to regulate hunting and fishing by all persons within the areas acquired by the United States for the Fort Randall and Big Bend Dam and Reservoir projects. The Tribe's request that the State be permanently enjoined from enforcing its game and fish laws within the areas acquired for the dam and reservoir projects, is denied. This Court reserves its ruling upon the parties' cross-motions for summary judgment concerning hunting and fishing on the reservation outside the taking areas. To the extent set forth above, the State's motion for summary judgment is granted, and the Tribe's motion for summary judgment denied.

The above constitutes this Court's findings of fact and conclusions of law in this matter.

APPENDIX B

LOWER BRULE SIOUX TRIBE,
Appellant,

v.

STATE OF SOUTH DAKOTA, and Jack Merwin, Secretary, Division of Game, Fish and Parks for the State of South Dakota, Appellees.

LOWER BRULE SIOUX TRIBE,
Appellee,

v.

STATE OF SOUTH DAKOTA, and Jack Merwin, Secretary, Division of Game, Fish and Parks for the State of South Dakota, Appellants.

Nos. 82-1635, 82-1636.

United States Court of Appeals,
Eighth Circuit.

Submitted March 15, 1983.

Decided June 27, 1983.

Rehearing and Rehearing En Banc Denied July 26, 1983.

HEANEY, Circuit Judge.

This action involves a dispute between the State of South Dakota and the Lower Brule Sioux Tribe over which of them will

regulate hunting and fishing activity at the Fort Randall and Big Bend dam and reservoir projects. Between 1954 and 1962, the United States acquired portions of the Lower Brule Sioux Reservation along the Missouri River to construct the Fort Randall and Big Bend projects. South Dakota seeks to exercise exclusive jurisdiction over hunting and fishing on the reservation land taken by the federal government for these projects. The state contends that the federal statutes authorizing the Fort Randall and Big Bend projects diminished the Lower Brule Reservation to the extent of the land taken by the United States, and abrogated the hunting and fishing rights guaranteed by treaty to the Lower Brule Sioux on that taken land.

The Lower Brule Sioux Tribe (hereafter Lower Brule Tribe or Tribe) contends that the Fort Randall and Big Bend projects did not alter the reservation boundaries or the

Indian hunting and fishing rights established by the Fort Laramie Treaty of 1868. The Tribe claims that state jurisdiction threatens its territorial integrity because state law generally applies to Indians outside of the reservation and because tribal members use the taken areas for hunting, fishing and other activities. Moreover, it argues that because South Dakota hunting and fishing laws do not recognize Indians as having rights distinct from the general public, state jurisdiction over the taken land threatens the livelihood of tribal members who depend on hunting and fishing for subsistence.

On cross motions for summary judgment, the district court held that South Dakota has exclusive jurisdiction to regulate hunting and fishing by all persons--both members and nonmembers of the Tribe--within

the Fort Randall and Big Bend taking areas. Because we find that the Lower Brule Reservation was not diminished and the Tribe's hunting and fishing rights were not abrogated by the federal statutes authorizing the Fort Randall and Big Bend projects, we reverse, 540 F.Supp. 276. We hold that absent federal regulation, the Tribe possesses exclusive jurisdiction to regulate hunting and fishing by tribal members on the reservation land taken for the two projects.

I

BACKGROUND

In the Fort Laramie Treaties of 1851, 11 Stat. 749 (1851), and 1868, 15 Stat. 635 (1868), Congress established the boundaries of the Great Sioux Reservation. See United States v. Sioux Nation of Indians, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980). The Treaty of 1868 explicitly reserved the right of the Sioux to hunt and fish within

certain delineated areas of the Great Sioux Reservation, including the area which is the subject of this action. In the Sioux Agreement of March 2, 1889, Congress divided the Great Sioux Reservation into several smaller ones, including the Lower Brule Reservation. 25 Stat. 888 (1889). The Lower Brule Reservation consisted of approximately 446,500 acres located in central South Dakota adjacent to and extending westward from the Missouri River. The 1889 Agreement established the reservation's eastern boundary at the "center of the main channel of the Missouri River" extending from "Old Fort George" south to "Fort Lookout." Id. at 889.

In the General Allotment Act of 1887, 24 Stat. 388 (1887), Congress empowered the President to allot land from all Indian reservations to tribal members and with tribal consent, to sell the surplus land to

white settlers. In 1889, 30 Stat. 1362 (1899), and again in 1906, 34 Stat. 124 (1906), Congress opened to settlement land on the western and southern portions of the Lower Brule Reservation. As a result of these Congressional enactments, over 200,000 acres of that reservation were opened to settlement by nonmembers of the Tribe; but the reservation's eastern boundary on the Missouri River was not altered, nor was land along the river opened for settlement.

In the Flood Control Act of 1944, Pub.L. No. 78-534, 58 Stat. 887 (1944) (codified as amended at 16 U.S.C. § 460d (1976), Congress authorized the establishment of a comprehensive flood control plan along the Missouri River, the Missouri River Basin Project. The 1944 Act did not authorize the acquisition of Indian property, but seven subsequent statutes authorized limited

takings of Indian lands for specific hydro-electric and flood control dams on the Missouri River in North and South Dakota.[1] These dams created huge lake-like reservoirs to control the Missouri River's seasonal flooding and to end the periodic devastation caused downstream. The Indian lands taken were of great value because the river bottom-land was well suited for raising and grazing domestic animals and was rich in game, and the river was well stocked with fish.

---

[1] The seven taking statutes passed by Congress in order to construct the dams within the Missouri River Basin Project were the Fort Berthold Garrison Act, Pub.L. No. 81-437, 63 Stat. 1026 (1949); Cheyenne River Oahe Act, Pub.L. No. 83-776, 68 Stat. 1191 (1954); Standing Rock Oahe Act, Pub.L. No. 85-915, 72 Stat. 1762 (1958); Fort Randall (Crow Creek) Act, Pub.L. No. 85-916, 72 Stat. 1766 (1958); Fort Randall (Lower Brule) Act, Pub.L. No. 85-923, 72 Stat. 1773 (1958); Big Bend (Lower Brule) Act, Pub.L. No. 87-734, 76 Stat. 698 (1962); and Big Bend (Crow Creek) Act, Pub.L. No. 87-735, 76 Stat. 704 (1962).

The lands taken for two of these flood control projects--the Fort Randall and the Big Bend--are at issue here. To construct these two projects, the United States acquired tribal and trust lands from the Lower Brule Tribe on the eastern boundary of its reservation along the Missouri River. By Act of July 6, 1954, Congress directed the Corps of Engineers to construct the Fort Randall Dam and Reservoir project. Pub.L. No. 83-478, 68 Stat. 452 (1954). Thereafter, the Corps commenced eminent domain proceedings in federal district court to acquire the necessary land on the Lower Brule Reservation. United States v. 7,996-.-92 Acres of Land, More or Less, in Lyman County, South Dakota. Civ. No. 186 C.D. (June 25, 1963). In September, 1958, Congress enacted Pub.L. No. 85-923, 72 Stat. 1773 (1958) (hereafter Fort Randall Act) to

provide compensation to the Tribe and its members for the land taken to construct the Fort Randall Dam and Reservoir Project. In October 1962, Congress passed Pub.L. No. 87-734, 76 Stat. 698 (1962) (hereafter Big Bend Act), which authorized the acquisition of and payment for tribal and trust lands on the Lower Brule Reservation needed for the Big Bend Dam and Reservoir Project.

Both the State of South Dakota and the Tribe have sought to exercise jurisdiction over the land taken from the Lower Brule Reservation by the United States for these two projects, and the Tribe and state occasionally have adopted conflicting hunting and fishing regulations. For example, South Dakota prohibits the use of lead or other toxic shot for hunting water fowl, while the Tribe does not. In the past, the Tribe and State have established different water fowl

hunting and fishing season restrictions. Both the Tribe and the state seek to derive income through hunting and fishing fees and licenses for the taken areas, and both have established their own wildlife refuges within the Big Bend taking area.

Because the Tribe was concerned that the state's efforts to exercise jurisdiction over hunting and fishing within the Fort Randall and Big Bend taking areas threatened the livelihood of its members as well as the territorial integrity of its reservation, it commenced this action in the court below seeking declaratory and injunctive relief. The Tribe requested a declaration that South Dakota lacked jurisdiction to regulate the hunting and fishing activities of any person within the exterior boundaries of the Lower Brule Reservation, including the Fort Randall and Big Bend taking areas. It also

sought to enjoin the state from applying and enforcing its hunting and fishing laws against both members and nonmembers of the Tribe within the reservation boundaries. The state counterclaimed seeking a declaration that it possessed exclusive jurisdiction to regulate hunting and fishing by all persons within the area taken for the Fort Randall and Big Bend projects. It contended that the Flood Control, Fort Randall, and Big Bend Acts diminished the Lower Brule Reservation to the extent of the taken area and that these acts abrogated the provisions of the 1868 Fort Laramie Treaty Reserving the Tribe's hunting and fishing rights within those areas.

On cross motions for summary judgment, the district court held that although the Big Bend Act did not diminish the Lower Brule Reservation, the Fort Randall Act effected a diminishment to the extent of the

land taken for the Fort Randall Dam and Reservoir Project. The court further held that the Flood Control, Fort Randall, and Big Bend Acts together abrogated the rights of the Lower Brule Tribe under the 1868 Fort Laramie Treaty to hunt, fish and exclusively occupy and use the land within the Fort Randall and Big Bend taking areas.[2] Finally, the court held that pursuant to these three federal statutes, South Dakota possesses exclusive jurisdiction to regulate hunting and fishing by all persons within the taken areas.[2] Both parties now appeal.

---

[2] The district court reserved ruling upon the parties' cross motions for summary judgment concerning jurisdictional control of hunting and fishing on the Lower Brule Reservation outside the Fort Randall and Big Ben taking areas. This matter is still pending in the district court.

II

DISESTABLISHMENT

"A federal treaty, statute, or agreement setting aside a reservation for the use and occupation of a tribe is necessarily preemptive of state jurisdiction over Indian hunting and fishing activity on the reservation." Getches, Federal Indian Law: Cases and Materials 618 (1978). Thus, when Congress eastablished the Lower Brule Reservation in the 1868 Fort Laramie Treaty, the Lower Brule Sioux acquired the right to hunt and fish on the reservation free of state law.

The first issue presented here is whether the Big Bend Act and/or the Fort Randall Act disestablished or diminished[3]

---

[3] In United States v. Dupris, 612 F.2d 319, 320 n. 3 (8th Cir. 1979), vacated and remanded for consideration of mootness, 446 U.S. 980, 100 S.Ct. 2959, 64 L.Ed.2d 836 (1980), prosecution dismissed on motion of

the boundaries of the Lower Brule Reservation. If no disestablishment occurred, the 1968 Fort Laramie Treaty would continue to preempt the application of state hunting and fishing laws on the reservation, and the Tribe would retain jurisdiction over tribal hunting and fishing on the land in controversy, except to the extend that the Tribe's

---

the government, 664 F.2d 169 (8th Cir. 1981), we explained:

> For the sake of clarity, we note that the question whether the boundaries of an Indian reservation, as drawn when the reservation was established, are redrawn after part of that reservation has been opened for settlement, has been expressed in several different ways by various courts. The process has been called disestablishment (referring to the disestablishment of the original reservation boundaries); diminishment (referring to a diminishing or shrinking of the original boundaries); termination of reservation status (if the original boundaries are redrawn, the reservation status of the land is no longer within the boundaries and thus is terminated); and a change of boundaries.

rights have been abrogated by subsequent congressional action. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). If either Act disestablished the reservation boundaries, the application of state law on the land taken by that Act no longer would be preempted, and South Dakota would have jurisdiction to regulate hunting and fishing by tribal members on that land absent federal law preserving the Indians' treaty hunting and fishing rights. See id.; Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

The Supreme Court and this Court have frequently addressed disestablishment questions.[4] Several principles developed in

---

[4] See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660

these cases control our inquiry in the present case.

Once Congress has established a reservation, all tracts included within the boundaries remain a part of the reservation until separated from it by Congress. DeCoteau v. District County Court, supra, 420 U.S. at 444, 95 S.Ct. at 1092-93. Congressional action removing certain reservation land from Indian ownership does not

---

(1977), aff'g, 521 F.2d 87 (8th Cir. 1975); DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); United States v. Dupris, supra, 612 F.2d at 319; United States v. Wounded Knee, 596 F.2d 790 (8th Cir.), cert. denied, 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 289 (1979); United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982, 97 S.Ct. 1677, 52 L.Ed.2d 376 (1977); United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir.1973); City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir.1972).

necessarily disestablish reservation boundaries. Disestablishment occurs only when Congress intends to create a smaller reservation with adjusted boundaries. United States v. Dupris, 612 F.2d 319, 320-322 (8th Cir. 1979); United States ex rel. Condon v. Erickson, 478 F.2d 684, 687 (8th Cir. 1973). It does not occur if Congress only intended to remove from Indian control certain land within the reservation boundaries while retaining its original exterior boundaries. Id.

Thus, congressional intent controls our analysis and we can find disestablishment only if Congress unmistakenly intended that result. See Rosebud v. Kneip,, supra, 430 U.S. at 603, 97 S.Ct. at 1371 (evidence "leads us *** to the firm conclusion that congressional intent was to exclude Gregory

County from the Rosebud Reservation") (emphasis added); DeCoteau v. District County Court, supra, 420 U.S. at 445, 95 S.Ct. at 1093 (relevant factors "all point unmistakenly to the conclusion that the Lake Traverse Reservation was terminated in 1891") (emphasis added). In DeCoteau, the Supreme Court stated:

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *** The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be in favor of the [Indians].'" Accordingly, the Court requires that the "congressional determination to terminate **** be expressed on the face of the Act or be clear from the legislative history."

DeCoteau v. District County Court, supra, 420 U.S. at 444, 95 S.Ct. at 1092-93 (citations omitted, emphasis added).

With these principles in mind, we turn to the question of whether the Big Bend and Fort Randall Acts disestablished the boundaries of the Lower Brule Reservation.

A. The Big Bend Act

The district court held that the Big Bend Act did not disestablish the boundaries of the Lower Brule Reservation. South Dakota contends that the district court erred because the face of the Act, as well as its legislative history and surrounding circumstances demonstrate that Congress intended to disestablish the reservation to the extent of the land taken in the Act. We disagree.

In United States v. Wounded Knee, 596 F.2d 790 (8th Cir.), cert. denied, 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 289 (1979), this Court faced the precise issue presented here, and held that Congress in the Big Bend

Act did not intend to disestablish the reservation boundaries.[5] Although the land in issue in Wounded Knee was taken from the Crow Creek Sioux Reservation by the Big Bend Act, we are bound by that precedent.[6]

Notwithstanding Wounded Knee, South Dakota--relying on the Supreme Court's

---

[5] In United States v. Wounded Knee, supra, 596 F.2d at 791-792, the defendants were convicted of committing rape within "Indian country" in violation of 18 U.S.C. §§ 1153 & 2031. On appeal, they contended that the district court lacked subject matter jurisdiction because the offenses had not occurred within "Indian country." Specifically, they argued that the rape occurred on land taken from the Crow Creek Sioux Reservation by the Crow Creek Big Bend Act, Pub.L. No. 87-735, 76 Stat. at 704 which disestablished the reservation's boundaries.

[6] The Lower Brule Sioux Reservation and Crow Creek Sioux Reservation are located on opposite sides of the Missouri River: the former is to the south and west of the river, and the latter is to the north and west. Congress authorized the taking of land from both reservations in separate, but virtually identical statutes which were passed on the same day. See note 1, supra.

decisions in Rosebud Sioux v. Kneip, supra and DeCoteau v. District County Court, supra,[7]--contends that language of the Big Bend Act is "precisely suited" to evince Congress' intent to disestablish reservation boundaries. We disagree. The Wounded Knee Court had the benefit of both Rosebud and DeCoteau, and yet found no clear expression of intent to disestablish.

Section 1(a) of the Big Bend Act provides in part that "[t]he entire interest *** [and] any interest the tribe or Indians

---

[7] In Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 584, 97 S.Ct. at 1362 and DeCoteau v. District County Court, supra, 420 U.S. at 425, 95 S.Ct. at 1084, the Supreme Court held that the Rosebud and Lake Traverse Reservations, respectively, were disestablished by statutes opening "surplus lands" to non-Indian settlement on portions of the reservations. The Court found in both cases that in light of clear legislative history and surrounding circumstances, the language of the statutes in question was "precisely suited" to the purpose of disestablishment.

may have within the bed of the Missouri River *** are hereby taken by the United States for the Big Bend Dam and Reservoir Project on the Missouri River ***." Pub.L. No. 87-734, § 1(a), 76 Stat. at 698. That section also provides that a sum certain be paid "in settlement of all claims, rights, and demands of the tribe and individual Indians arising out of the taking under this Act." Id.

This language falls short of that utilized by Congress when it has unequivocally expressed its intent to disestablish a reservation's boundaries.[8] Indeed, in

---

[8] In Mattz v. Arnett, supra, 412 U.S. at 504 & n. 22, 93 S.Ct. at 2258 & n. 22, the Supreme Court cited the following as examples of "clear language of express termination:" "the Smith River Reservation is hereby discontinued," 15 Stat. 221 (1868); "the same being a portion of the Colville Indian Reservation* * *is hereby

Rosebud and DeCoteau, the Supreme Court recognized that statutory provisions very similar to those employed in section 1(a) of the Big Bend Act did not constitute "clear language of express termination," as is evident from the Court's heavy reliance on the legislative histories and surrounding circumstances of the acts in question to support its findings of disestablishment. See Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 589-615, 97 S.Ct. at 1364-1378; DeCoteau v. District County Court, supra, 420 U.S. at 431-449, 95 S.Ct. at 1086-1095.

Because a clear congressional intent to disestablish cannot be found on the face of the Big Bend Act, the necessary intent can

---

vacated and restored to public domain," 27 Stat. 63 (1892); and "the reservation lines of the said Ponca and Otoe and Missouri Indian reservations be, and the same are hereby abolished," 33 Stat. 218 (1904).

be found only if there is operative statutory language that is "precisely suited" to the purpose of disestablishment and this purpose is confirmed by the Act's legislative history and surrounding circumstances. See DeCoteau v. District Court, supra, 420 U.S. at 444-445, 95 S.Ct. at 1093. In Wounded Knee, we concluded that neither the legislative history nor surrounding circumstances of the Act demonstrate a clear intent to disestablish.

The legislative history is ambiguous. As we stated in Wounded Knee:

> while there are a few stray phrases which could be interpreted as indicating both the presence and the absence of diminishment, we are mindful that "[a] congressional determination to terminate must be expressed on the fact of the Act or be clear from the surrounding circumstances and legislative history." Mattz v. Arnett, 412 U.S. at 505, 93 S.Ct. at 2258. [Emphasis included.] There is simply nothing in the legislative history which satisfies this requirement.

United States v. Wounded Knee, supra, 596 F.2d at 796 (footnote omitted).

Moreover, the Big Bend Act's surrounding circumstances suggest that Congress did not intend to disestablish the Lower Brule Reservation. One of the Act's "principal purposes *** [was] to provide for the improvement of the social and economic conditions of the members of the Lower Brule Sioux Tribe." S.Rep. No. 1636, 87th Cong., 2d Sess. 3 (June 28, 1962). As in Wounded Knee, however, the property taken for the Big Bend project included some of the most important reservation land. The report of the Senate Committee considering the Big Bend bill referred to the taken land as the Tribe's "best bottom land" and described at some length the land's value to the Indians:

> Most of the Indians on the reservation live in the vicinity of the Missouri River and the tributary streams and creeks. These locations are accessible to water for

> domestic purposes. They contain the rich river bottom lands and the timbered area which supplies firewood and building material and provides shelter for livestock. They have been the habitat of the game and the prime source of the natural products on which Indians depend in part for subsistence. They have carried the livestock of the entire reservation in drought years. They have provided sheltered feeding areas essential to successful stock operations.

Id. at 3, 7.

An intent to remove this valuable river bottomland from the reservation would hardly be consistent with Congress' concern for promoting the economic development of the Tribe.

In addition, because the reservation land was taken in order to construct a dam and reservoir, continued Indian control of this land is not inconsistent with the federal government's purpose in acquiring the property, as might be the case if, for example, the reservation was acquired to

permit settlement by non-Indians. See note 10, infra. In fact, subsequent to the construction of the Big Bend Dam and Reservoir Project, the members of the Lower Brule Tribe have continued to utilize the land and exploit its resources, and the Tribe has regulated hunting and fishing within the taken area. As we concluded in Wounded Knee, this jurisdictional history militates against a finding of disestablishment. United States v. Wounded Knee, supra, 596 F.2d at 790.[9]

---

[9] In Wounded Knee, the Crow Creek Tribe provided exclusive regulation of the taken land. United States v. Wounded Knee, supra, 596 F.2d at 795. The record in this case shows that South Dakota has established a wildlife refuge and attempted to enforce its hunting and fishing regulations on the land taken from the Lower Brule Sioux. This evidence of at least some exercise of concurrent jurisdiction by the Indians and the state does not alter our conclusion that the jurisdictional history of the land taken by the Big Bend Act militates against a finding

In summary, neither the language on the face of the Big Bend Act nor its legislative history and surrounding circumstances support a finding of disestablishment.[10] Accordingly, the district court's judgment with respect to the Big Bend Act is affirmed.

---

of disestablishment. The Supreme Court generally has relied on jurisdictional history to support its finding that congressional legislation disestablished a reservation only when the Indians exercised no jurisdiction over the land in question after the statute was enacted. See Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 603, 97 S.Ct. at 1371; DeCoteau v. District County Court, supra 420 U.S. at 442-443, 95 S.Ct. at 1091-1092.

[10] In sharp contrast to the Big Bend Act, the legislative histories and surrounding circumstances of the statutes involved in Rosebud and DeCoteau demonstrate a clear congressional intent to disestablish reservation boundaries. In those two cases the Supreme Court emphasized the "familiar forces" which accompanied the passage of the statutes in question: A nearby and growing population of whites was urging authorities to open the reservatjon to general settlement, and the Indians, suffering from illness and poor harvests, were developing

B. The Fort Randall Act

The district court held that Congress intended to disestablish the Lower Brule Reservation to the extent of the area taken by the Fort Randall Act. Because we find that such an intent is not expressed on the face of the Act, nor clearly demonstrated by

---

an increasing need for cash and direct assistance. Partially as a result of these forces, Congress passed the General Allotment Act of 1887 which empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell surplus lands to non-Indian settlers, with the proceeds from these sales being dedicated to the Indians' benefit. Against this background, negotiations took place with the objective of opening the reservations to settlement. Subsequent to the enactment of the statutes opening reservation land, state jurisdiction over the ceded land went virtually unquestioned. The Supreme Court, in both Rosebud and DeCoteau, found that these surrounding circumstances, along with the clear legislative histories of the "surplus land" statutes in question, supported a finding that Congress intended to disestablish the reservations. Rosebud Sioux Tribe v. Kneip, supra 430 U.S. at 589-615, 97 S.Ct. at 1364-1378; DeCoteau v. District County Court, supra, 420 U.S. at 431-449, 95 S.Ct. at 1086-1095.

its legislative history and surrounding circumstances, we reverse.

The district court primarily based its Fort Randall holding on our decision in Wounded Knee and on Section 6 of the Fort Randall Act, which refers to the "[reservation] boundaries as diminished." Pub. L. No. 85-923, § 6, 72 Stat. at 1774. In holding that the Big Bend Act did not disestablish the boundaries of the Crow Creek Reservation in Wounded Knee, we contrasted the omission of the phrase "as diminihsed" from the Big Bend Act with its inclusion in the Fort Randall Act and three other statutes authorizing takings for flood control projects in the Missouri River Basin Project.

In Wounded Knee, however, we did not conclude that Congress intended to disestablish reservation boundaries in the Fort

Randall Act.[11] Instead, we cautioned that the reference to the "as diminished" phrase in the other taking statutes was "merely to compare and contrast the earlier acts with P.L. 87-735 [Big Bend Act] in an attempt to divine the intent of Congress with regard to P.L. 87-735." United States v. Wounded Knee, supra, 596 F.2d at 795 n. 8. Moreover, we stated that our comparison was based on the parties' "assum[ption] here and in the district court that [the Fort Randall Act] diminished the [reservation] by taking a strip of land along the Missouri River." Id. The Crow Creek and Lower Brule Sioux

---

11 As with the Big Bend Acts, Congress enacted separate, but virtually identical, Fort Randall Acts to authorize the acquisition of land from the Crow Creek and Lower Brule sides of the Missouri River. The Wounded Knee Court discussed the land taken from the Crow Creek Reservation rather than from the Lower Brule Reservation on the opposite side of the river. United States v. Wounded Knee, supra, 596 F.2d at 792-795.

Tribes were not parties to the Wounded Knee case. The only representatives before the district court in that case were the United States Attorney for South Dakota and counsel for a criminal defendant.[12] Id. at 791-793. Moreover, the Wounded Knee Court did not undertake any review of the legislative history or surrounding circumstances of the Fort Randall Act since the offense involved in the case had occurred on the Big Bend portion of the reservation. The reference was made as an index of comparison only and the required analysis was never performed regarding the Fort Randall Act.

---

[12] The United States Attorney obviously was concerned with preserving his conviction and argued to support federal jurisdiction that the absence of "as diminished" in the Big Bend Act carried great significance. The defendant, by arguing that the Fort Randall Act had disestablished the reservation, was enabled to make the "ingenious argument" that Congress had a similar intention with respect to the Big Bend taking area. United States v. Wounded Knee, supra, 596 F.2d at 793.

In sum, the teaching of Wounded Knee lies in its holding and analysis that the Big Bend Act did not accomplish a disestablishment of the reservation. In approaching the issue of whether the Fort Randall Act disestablished the reservation, the same careful analysis must be employed.

The state first points to section 1 of the Fort Randall Act, which provides for a sum certain payment:

> in settlement of all claims, rights and demands of said tribe and its members arising out of the construction of the Fort Randall Dam and Reservoir Project[.]

Pub.L. No. 85-923, § 1, 72 Stat. at 1773. This language is virtually identical to that employed in section 1(a) of the Big Bend Act. See slip op., supra, at 816-817. We found no clear expression of an intent to disestablish in section 1(a) of the Big Bend Act, and we find none in section 1 of the Fort Randall Act.

Section 6 of the Fort Randall Act authorizes the federal government to purchase and sell certain lands "either inside or outside the [reservation] boundaries as diminished." Pub.L. No. 85-923, § 6, 72 Stat. at 1774. There is no equivalent language in the Big Bend Act. This statutory language is consistent with a congressional intent to disestablish. Nonetheless, we believe that this "as diminished" phrase does not establish a congressional determination to disestablish which is expressed on the fact of the statute. This isolated phrase in a section of the Fort Randall Act having nothing to do with the location of reservation boundaries falls short of "clear language of express disestablishment." Mattz v. Arnett, supra, 412 U.S. at 504 & n. 22, 93 S.Ct. at 2258 & n. 22. See note 8 supra. A clear and unambiguous intent to disestablish cannot be

found from isolated phrases in the statutory language. United States v. Dupris, supra, 612 F.2d at 332; United States ex rel. Condon v. Erickson, supra, 478 F.2d at 686-687.

Erickson is particularly instructive here. We held in that case that no disestablishment was effecuated by a provision in a 1908 statute involving the Cheyenne River Tribe which permitted allottees on the opened area of the reservation to select substitute lands on the "reservation thus diminished." We stated:

> In § 2 of the 1908 Act it is stated as a proviso that the Secretary may permit Indians who have received allotments in the area opened to settlement to relinquish such and receive a new allotment "within the respective reservation thus diminished ***." [Emphasis included.] This proviso is subject to two competing constructions. The reservation thus diminished, as contended by appellant, means a smaller reservation with adjusted boundaries. On the other hand the reservation could have retained its

> original exterior boundaries even though the portion held by Indians was diminished by virtue of the sale of lands within the boundaries to outsiders.

United States ex rel. Condon v. Erickson, supra, 478 F.2d at 687 (emphasis added). In discussing the relevant legislative history, we again emphasized the different constructions that might be given to the "diminished" language:

> Both the House and Senate Committee reports are silent as to the 1908 Act's effect upon the boundaries of the Cheyenne River Reservation. Appellant points out the various references in the reports and attached documents to a diminished reservation and a relinquisment of land by the Indians. [Emphasis included.] A reservation, as already pointed out, may be diminished in land size by sale of portions thereof to non-Indians without changing the reservation's boundaries.

Id. at 688 (footnote omitted, emphasis added).

Here, as in Erickson, the statutory phrase "as diminished," standing alone, is ambiguous and does not demonstrate a clear congressional intent to disestablish the reservation boundaries. Therefore, only clear legislative history and surrounding circumstances would support the district court's decision. We, however, can find nothing in the Fort Randall Act's legislative history and surrounding circumstances which is significantly different than that underlying the Big Bend Act. Thus, we must find that there is insufficient evidence of disestablishment to overcome the general rule that doubtful expressions of intent must be resolved in favor of the Indians. See slip op., supra, at 815-816.

The district court observed that "[t]he legislative history of the acts provides little guidance concerning the [disestablishment issue]." With this statement we

must agree. The history relevant to the question of reservation disestablishment in the taken area is sparse, and that which exists is ambiguous. In fact, there is nothing which significantly differentiates the legislative history of the Fort Randall Act from that of the Big Bend Act. Accordingly, "while there are a few stray phrases which could be interpreted as indicating both the presence and the absence of diminishment, *** [t]here is simply nothing in the legislative history which satisfies" the requirement that the history clearly show an intent to disestablish when Congress has not expressed that purpose on the fact of the statute. United States v. Wounded Knee, supra, 596 F.2d at 796.

Similarly, an intent to disestablish cannot be found in the surrounding circumstances of the Fort Randall Act. Again,

these surrounding circumstances are virtually identical to those of the Big Bend Act. In both instances, the reservation lands were taken for flood control projects rather than for settlement. The exercise of jurisdiction by the Tribe over the land taken by the Acts is not inconsistent with the purpose of the authorized takings. The Lower Brule Sioux, in fact, have utilized the land taken and have sought to enforce their laws on it. Finally, these circumstances stand in sharp contrast to those present in Rosebud and DeCoteau which led the Supreme Court to conclude that the surrounding circumstnces of the "surplus land" statutes in question showed a clear congressional intent to disestablish the Rosebud and Lake Traverse Reservations. See slip op., supra at 817-818 & n. 10.

In addition, the district court's conflicting conclusions of the disestablishment question with regard to the Fort Randall and Big Bend Acts imputes to Congress a very impractical and unlikely purpose with respect to flood control on the Missouri River. If the court below was correct, it would mean that in acquiring the land necessary for the comprehensive Missouri River Basin Project through the seven taking statutes, see note 1, supra, Congress in the first act (1949 Fort Berthold Garrison Act) and the last two acts (1962 Crow Creek and Lower Brule Big Bend Acts) preserved existing reservation boundaries, but in the middle four acts (1954 Cheyenne River Oahe Act, 1958 Standing Rock Oahe Act, 1958 Crow Creek and Lower Brule Fort Randall Acts), by inclusion of the words "as diminished," it did not do so. There simply is no indication that Congress

intended to create such an unusual and impractical result.

Finally, in the Big Bend Act, which was enacted four years after the Fort Randall Act, Congress expressed its understanding that the lands taken by both Acts were within the Lower Brule Reservation. Section 11 of the Big Bend Act authorized the purchase of substitute lands for individuals holding allotments "within the taking area of the Fort Randall or Big Bend projects," and provided that the land selected may be "inside or outside the boundaries of the reservation." Pub.L. No. 87-734, § 11, 76 Stat. at 701. No reference was made to the reservation "as diminished." Id. Moreover, there are repeated references in the legislative history of the Big Bend Act, by members of Congress and various government departments, to both taking areas as being

"within the reservation" or "on the reservation." See S.Rep. No. 1636, 87th Cong., 2d Sess. 11, 16, 21 and 31 (June 28, 1962); H.Rep. No. 852. 87th Cong., 1st Sess. 14, 21. 26, 30 and 31 (Aug. 5, 1961).[13] These expressions confirm the apparent intent of

---

[13] In distinguishing the Fort Randall Act from Big Bend Act, the district court relied in part on the inclusion of three sections in the Big Bend Act which referred to its taking area as "within" or "on" the reservation, and the omission of those sections in the earlier Fort Randall Act. Specifically, the court referred to section 1(a) ("bed of the Missouri River * * * within the boundaries of the reservation"); section 9 (removal of timber and improvements "on the reservation"); and section 12 (expenses incurred due to "taking of Indian lands within the reservation") of the Big Bend Act. The importance of this contrast is questionable when the 1958 Standing Rock Oahe Act is considered. Pub.L. No. 85-915, 72 Stat. at 1762. The Oahe Dam is another one of the dams the Missouri River Basin Project, and its enabling act, which contains the words "as diminished" in Section 11, also contains two of the three "within the reservation" references discussed by the district court. Pub.L. No. 85-915, § 1, 72 Stat. at 1762 (riverbed); Pub.L. No. 85-915, § 13, 72 Stat. at 1765 (expenses). Thus, a more plausible explanation for the different

Congress in 1954 when it directed the Corp of Engineers to negotiate with the Lower Brule Sioux to acquire the land necessary for the Fort Randall project and specifically referred to the area to be taken as "within the reservation." Act of July 6, 1954, Pub.L. No. 83-478, § 2(c), 68 Stat. at 453.[14]

In summary, neither the Big Bend Act nor the Fort Randall Act disestablished the

---

wording in the Big Bend and Fort Randall Acts is the different format of the Fort Randall Act, coupled with a simple difference in drafting style.

[14] The Act of July 6, 1954, Pub.L. No. 83-478, 68 Stat. 452 (1954), began the process of constructing the Fort Randall Dam and Reservation Project. After it was enacted, the Corps of Engineers initiated an eminent domain proceeding to acquire the land necessary for the Fort Randall project. In 1958, Congress enacted the Fort Randall Act directly at issue here to provide the Lower Brule Sioux with compensation for the reservation land taken in addition to that awarded by the federal district court in the earlier eminent domain proceeding.

boundaries of the Lower Brule Reservation. Nonetheless, even though the land taken for the two flood control projects remains in the reservation, the Lower Brule Sioux do not retain their treaty right to hunt and fish on the reservation free from state regulation if that right was abrogated by the Fort Randall and Big Bend Acts. We turn to that question now.

III

ABROGATION

When Congress established the Lower Brule Reservation in the 1868 Fort Laramie Treaty, the Lower Brule Sioux acquired the right to hunt and fish on the reservation free of state law. See slip op., supra, at 814-815. Nonetheless, Congress has the power to unilaterally abrogate Indian treaty rights and to authorize the application of state law to Indian activities on reservation land. McClanahan v. Arizona State Tax

Commission, 411 U.S. 164, 170-172, 93 S.Ct. 1257, 1261-1262, 36 L.Ed.2d 129 (1973); United States v. White, 508 F.2d 453, 456 (8th Cir. 1974). In order to abrogate treaty rights and authorize the application of state law, however, Congress must expressly do so.[15] Id. Moreover, any doubtful expressions of congressional intent must be resolved in favor of the Indians. United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002, 1006 (8th Cir. 1976). The Supreme Court has cautioned that "the intention to abrogate or modify a treaty is not

---

[15] The questions of whether Congress has abrogated Indian treaty rights or has authorized states to apply their laws to Indian conduct on reservation land are not always a single issue. In this case, however, the two questions present a single issue because the treaty right involved is the right to hunt and fish free of state regulation. For convenience, we will discuss the issue in terms of abrogation.

to be lightly imputed to the Congress." Menominee Tribe v. United States, supra, 391 U.S. at 413, 88 S.Ct. at 1711. With these principles in mind, we turn to the question of whether the hunting and fishing rights of the Lower Brule Sioux were abrogated by the federal statutes authorizing the Fort Randall and Big Bend projects.

The district court held that the Fort Randall and Big Bend Acts abrogated the rights guaranteed to the Lower Brule Sioux by the 1868 Fort Laramie Treaty to exclusively use and occupy the reservation land and to hunt and fish on that land free of state regulation.[16] Because we find that

---

[16] The district court also held that the Flood Control Act of 1944 did not abrogate any of the treaty rights of the Lower Brule Tribe or its members. We agree with this holding. It is fully consistent with this Court's decisions in United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002 (8th Cir.1976) (1944 Flood Control Act did not abrogate the Tribe's treaty right to

Congress did not intend to abrogate the Indians' treaty-reserved hunting and fishing rights when it enacted the Fort Randall and Big Bend Acts, we reverse the district court's judgment on this issue.[17]

The district court initially concluded that a finding of abrogation was supported by the plain language of the Fort Randall and Big Bend Acts. The court relied on Red Lake Bank of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied. 449 U.S. 905, 101 S.Ct. 279, 66 L.Ed.2d 136 (1980), to state that "[i]t has

---

exclusively own and occupy reservation land), and United States v. White, 508 F.2d 453 (8th Cir. 1974) (federal statute prohibiting the taking of bald eagles did not abrogate tribal members' treaty right to hunt on reservation land).

[17] The Lower Brule Tribe does not appeal from the district court's finding that the Fort Randall and Big Bend Acts abrogated its treaty right to exclusive occupation and use of the taken areas.

been held that statutes which remove 'all right, title and interest' of a tribe in certain land operate to extinguish hunting and fishing rights in the land." Then citing statutory language in the Fort Randall Act (section 1), referring to the "settlement of all calims, rights and demands" arising from the project's construction, and in the Big Bend Act (section 1(a)) referring to a taking of the Tribe's "entire interest" in the specified land, the court concluded that these provisions alone "may be *** sufficient indicia of congressional intent to extinguish treaty hunting and fishing rights of the Tribe within the taken area." We cannot agree.

The district court's reliance on this Court's Red Lake decision was misplaced. In that case, we explicitly emphasized that our finding of abrogation of hunting and fishing

rights was premised on the fact that the reservation had been diminished when the Chippewa voluntarily ceded the property in question to the United States. Red Lake Band of Chippewa Indians v. Minnesota, supra, 614 F.2d at 1162. Red Lake does not stand for the proposition that Congress necessarily abrogates treaty-reserved hunting and fishing rights when it uses statutory language taking an interest in certain reservation land. When, as here, the statutes in question have not disestablished reservation boundaries, general language referring to the "entire interest" or "all claims" in certain land falls short of stating a clear purpose to abrogate specific treaty rights. United States v. White, supra, 508 F.2d at 455-458.

The district court supported its finding of abrogation with two passages from the

legislative history which referred to "treaty" rights when discussing the property rights taken from the Lower Brule Sioux.[18] The Court's reliance on this legislative history was misplaced. It failed to recognize that the Tribe's treaty hunting and

---

[18] Specifically, the district court relied on a House Report from the Big Bend Act which stated: "The principal purposes *** and the *** Tribe *** for the trust lands acquired *** [and] to compensate the tribe and its members for treaty and tribal damages ***" H.Rep. No. 852, 87 Cong., 1st Sess. 6 (Aug. 5, 1961) (emphasis added).

The district court also pointed to a House Report from the Fort Randall Act which stated:

> The Lower Brule and Crow Creek Reservations include approximately 10,158 acres in the bed of the Missouri River ***. The committee deemed it in the overall interest that this acreage be removed from tribal ownership to prevent jurisdictional disputes and conflicts which would arise from exercise of treaty rights.

H.Rep. No. 2054, 85 Cong., 2d Sess. at 4 (June 30, 1958).

fishing rights are severable from their treaty rights to exclusively own, occupy and utilize the land granted to them as a reservation.[19] Thus, when the United States acquired reservation land to construct the Fort Randall and Big Bend projects, the Lower Brule Sioux necessarily lost their

---

[19] In addition, with respect to the second House Report relied upon by the district court, see note, 18 supra, the court obviously assumed that the "jurisdictional disputes" referred to were between the Tribe and the state. It is more likely, however, that Congress was concerned about jurisdictional disputes between the Tribe and the Corps of Engineers. This latter problem theoretically could be removed by federal ownership of the riverbed and express provisions concerning federal authority. It is difficult to understand how federal ownership of the riverbed would diminish the possibility of jurisdictional disputes between the Tribe and the states. This reading is buttressed by House Report No. 852, in which the committee stated that the riverbed was to be acquired from the Indians "to prevent juridictional disputes and to insure complete control of the project." H.Rep. No. 852, supra, at 9. (Emphasis added). The "complete control" contemplated by the committee obviously would be by the federal government.

treaty rights to exclusively own, occupy and utilize that land. The Indians' treaty rights to hunt and fish free of state regulation, however, were not necessarily abrogated by the Fort Randall and Big Bend takings since they could still exercise those rights after the projects were completed. Accordingly, the general references in the taking acts' legislative histories to undifferentiated "treaty" rights acquired by the United States do not clearly establish that Congress intended to abrogate the hunting and fishing rights of the Lower Brule Sioux.

The Supreme Court decision in Menominee Tribe v. United States, supra, is instructive here. The Court held that the Menominee Termination Act of 1954, which expressly terminated the reservation and subjected the Tribe and its members of state

law generally, did not extinguish the Menominees treaty hunting and fishing rights or authorize Wisconsin to impose its hunting and fishing laws on the members of the Tribe. 391 U.S. at 412-413, 88 S.Ct. at 1710-1711. In the absence of an explicit repeal, the Court stated that no abrogation would be inferred even though the reservation had been terminated because "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." Id. at 413, 88 S.Ct. at 1711.

We thus turn to the final evidence relied upon by the district court to support its finding of abrogation. The Fort Randall and Big Bend Acts recognize the right of the Tribe to have "free access'" to the Missouri River shoreline, "including the right to hunt and fish along the aforesaid shoreline and reservoir," but provide that those rights are "subject *** to regulations

governing the corresponding use by other citizens of the United States." Pub.L. No. 85-923, § 5, 72 Stat. at 1774 (Fort Randall Act); Pub.L. No. 87-734, § 10, 76 Stat. at 701 (Big Bend Act). The district court seized upon this language to conclude that Congress contemplated subjecting Indians to the application of state laws by the states, and thus it intended to abrogate the hunting and fishing treaty rights of the Lower Brule Sioux.

The "corresponding use" clause, contrary to the views of the court below and South Dakota, does not clearly and unambiguously subject the hunting and fishing rights of the Lower Brule Sioux to state regulation. Indeed, the clause makes no explicit reference to state law, and thus, the "regulation" contemplated could be either by the federal government through the

Secretary of Army and Corps of Engineers or by the state.

The Supreme Court's decision in Menominee Tribe v. United States, supra, again is helpful here. The Termination Act of 1954 provided that after the Tribe conveyed title to all reservation property to the State of Wisconsin, federal supervision would cease and "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 391 U.S. at 410, 88 S.Ct. at 1709. Despite this language, which is more explicit as to the application of state law than the language in the Fort Randall and Big Bend Acts, the Supreme Court did not find that Congress had abrogated the Tribe's hunting and fishing rights and authorized

Wisconsin to apply its laws to tribal members. Rather, after considering other factors--including the Termination Act's legislative history and other relevant Indian statutes--the Court found that the Act did not abrogate the Menominee's hunting and fishing rights of the Lower Brule Sioux.

The "corresponding use" clause, contrary to the views of the court below and South Dakota, does not clearly and unambiguously subject the hunting and fishing rights of the Lower Brule Sioux to state regulation. Indeed, the clause makes no explicit reference to state law, and thus, the "regulation" contemplated could be either by the federal government through the Secretary of Army and Corps of Engineers or by the state.

The Supreme Court's decision in Menominee Tribe v. United States, supra, again is helpful here. The Termination Act

of 1954 provided that after the Tribe conveyed title to all reservation property to the State of Wisconsin, federal supervision would cease and "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 391 U.S. at 410, 88 S.Ct. at 1709. Despite this language, which is more explicit as to the application of state law than the language in the Fort Randall and Big Bend Acts, the Supreme Court did not find that Congress had abrogated the Tribe's hunting and fishing rights and authorized Wisconsin to apply its laws to tribal members. Rather, after considering other factors--including the Termination Act's legislative history and other relevant Indian statutes--the Court found that the Act did not abrogate the Menominee's hunting

and fishing rights even though it had terminated the reservation. Id. at 412-413, 88 S.Ct. at 1710-1711.

We thus must look beyond the "corresponding use" language of Section 5 of the Fort Randall Act and Section 10 of the Big Bend Act to determine whether there is other evidence which will confirm that Congress clearly intended to abrogate the Lower Brule Sioux's hunting and fishing rights.

The relevant legislative histories in the Fort Randall and Big Bend Acts do not support a finding of abrogation. Although some passages suggest that Congress intended to abrogate the Tribe's hunting and fishing rights, others support a contrary conclusion.[20] Such ambiguous evidence does not

---

[20] For example, in House Report No. 852, officials of the Army Corps of Engineers opposed uncontrolled Indian hunting and fishing in the Big Bend taking area and suggested that the state regulate these

demonstrate a clear congressional intent to abrogate the hunting and fishing rights that are so important to the Tribe and its members.

Nor do the surrounding circumstances of the Fort Randall and Big Bend Acts support a finding of abrogation. The Fort Randall and Big Bend projects, as well as the other dam and reservoir projects in the Missouri River

---

activities. H.Rep. No. 852, supra, at 17-18, 31. On the other hand, although it is well settled that Indians must be compensated for treaty rights abrogated by Congress, the legislative histories of the Big Bend and Fort Randall Acts indicate that the Lower Brule Sioux received no payment for the loss of hunting and fishing rights. See H.Rep. No. 852, supra, at 9-10 (Big Bend Act); S.Rep. No. 2369, 85th Cong., 2d Sess. 3 (Aug. 14, 1958), and H.Rep. No. 2054, supra, at 3 (Fort Randall Act).

Another example is contained in Senate Report No. 2369, in a discussion of what ultimately became Section 5 of the Fort Randall Act. The Report proposed to include the following provision in the Act:

> [S]aid tribal council and the members of said Indian tribe shall

Basin Project, were developed under the general authority created by Congress in the

---

> be permitted to have, without cost, access to the shoreleine of the reservoir including permission to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations *governing the corresponding use by other citizens of the United States.*

S.Rep. No. 2369, supra, at 13.

This language is identical to that in the final statute. The asterisks are accompanied by a footnote:

> The tribe wants the language between * and * to read "agreed on by the tribal council and the Chief of Engineers, United States Army." That language would leave hunting and fishing unregulated in the event of a failure to agree on regulations.

Id.

It is likely that the Lower Brule Tribe and the government viewed the phrase "regulations governing the corresponding use" to refer to regulations by the Corps of Engineers, not by the state, and that the only dispute concerned the Tribe's ability to veto Corps regulations.

Flood Control Act of 1944. Pub.L. No. 78-534, 58 Stat. at 887 (codified as amended at 16 U.S.C. § 460d (1976)). The Act created a general scheme of federal, not state, regulation of the flood control projects it authorized. The Act, enacted in response to national needs,[21] contemplated that the United States would pay for the acquisition of land for the projects and would pay for construction of the dams, authorized the Army Corps of Engineers and

---

21 The 1944 Act's legislative history plainly indicates that it was enacted in response to two critical national needs. First, Congress believed that a comprehensive federal solution was required to avoid widespread and damaging floods in several of the major river basins of the nation, such as those experienced in 1942 and 1943. H.Rep. No. 1309, 78th Cong., 2d Sess. 3 (Mar. 29, 1944), U.S. Code Cong. Serv. 1944, p. 1349. Second, Congress believed that the development of a comprehensive flood control system would provide federal public service jobs for "employing the returning soldiers [from World War II] on useful and meritorious work." Id. at 4, U.S. Code Cong. Serv. 1944, p. 1352.

Secretary of the Army (then Secretary of War) to operate the projects,[22] and provided that the Secretary of the Army should enact and enforce regulations to safeguard the projects.[23] Such a system of federal regulation is inconsisent with an abrogation of

---

22 Section 4 of the 1944 Act began:

> The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct maintain and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. [Emphasis added.]

Pub.L. No. 78-534, § 4, 58 Stat. 887, 889-890 (1944) (codified as amended at 16 U.S.C. § 460d (1976).

23 Section 4 of the 1944 Act stated in part:

> The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall

the Indians' treaty rights to hunt and fish on their reservations free of state regulation, and the 1944 Act reveals no congressional intent to abrogate those rights.

> be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the state in which such area is situated. [Emphasis added.]

Id.

The district court concluded that the last sentence quoted above authorized South Dakota to apply its laws to hunting and fishing activities by tribal members within the Fort Randall and Big Bend taking areas. We cannot agree with the district court's correct determination that the 1944 Flood Control Act did not abrogate the treaty hunting and fishing rights of the Lower Brule Sioux. See note 16, supra. The "inconsistent use" sentence of section 4 cannot be viewed in isolation. Read as a whole, the 1944 Act

In addition, the fact that the Fort Randall and Big Bend Acts authorize the

---

envisions a scheme of federal--not state--regulation over flood control projects. See slip op., supra, at 825 & nn. 21-23. See also H.Rep. No. 1309, supra at 5, U.S. Code Cong. Serv. 1944, p. 1353 ("The Congress and the country are agreed that the planning and execution of flood-control projects should be a function of the Corps of Engineers of the United States Army"); 90 Cong.Rec. 4130 (May 8, 1944) ("This bill lays down the principle that all reservoirs constructed with Federal funds shall be operated under the regulations of the War Department. This is common sense."). Moreover, both the text of section 4 and its preamble expressly state that the regulation contemplated by Congress would be federal. See notes 22 & 23, supra. Finally, there is simply no indication in the legislative history that Congress even considered Indian rights when it adopted section 4. Under these circumstances, we believe that the "inconsistent use" sentence in section 4 means only that the Secretary of the Army cannot promulgate regulations regarding recreational facilities" which contravene state conservation laws. It does not authorize South Dakota to apply its laws to hunting and fishing activities by the Lower Brule Sioux on their reservation within the Fort Randall and Big Bend taking areas. If Congress had intended this latter result, it was "incumbent upon

taking of Indian land and the development of flood control projects does not itself create any suggestion that Congress contemplated abrogating the Indians right to hunt and fish free of state regulation. There simply is nothing about the construction of a federal dam and reservoir project that necessarily requires Indians to lose their hunting and fishing rights. In contrast,

---

[it] to expressly" do so. United States v. White, supra, 508 F.2d at 457.

The "inconsistent use" provision in section 4, however, might well be relevant to the issue of whether the Tribe or the state has jurisdiction to regulate hunting and fishing by nonmembers of the Tribe within the Fort Randall and Big Bend taking areas. See New Mexico v. Mescalero Apache Tribe, ___ U.S. ____, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983); Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Because we remand this issue to the district court, see slip op., infra, at 827-828, we need not determine the relevance of section 4 to the question of jurisdiction over nonmembers of the Tribe.

the treaty right to exclusive occupation and use of reservation land is necessarily taken from an Indian tribe when a federal flood control project, which is also used for recreational activities by all persons, is constructed on the reservation.

Finally, there are two other factors which the district court considered important. The court was impressed with Congress' failure to provide more explicit protection for treaty hunting and fishing rights when it enacted the Flood Control, Fort Randall, and Big Bend Acts. It is settled, however, that federal preemption of state regulation of Indian hunting and fishing rights guaranteed by treaty is not dependent on specific reaffirmation by Congress each time it legislates with respect to an Indian reservation. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-145, 100 S.Ct. 2578, 2582-2584, 65

L.Ed.2d 665 (1980); McClanahan v. Arizona State Tax Commission, supra, 411 U.S. at 170-172, 93 S.Ct. at 1261-1262. Rather, the opposite is true: unless Congress expressly authorizes their application, state laws do not apply to tribal members on their reservations. McClanahan v. Arizona State Tax Commission, supra, 411 U.S. at 170-172, 93 S.Ct. at 1261-1262.

The district court also plainly believed that state jurisdiction over tribal hunting and fishing in the Fort Randall and Big Bend taking areas was necessary to avoid jurisdictional confusion in those areas. Much of the potential for confusion perceived by the district court, however, was premised on its erroneous conclusion that the Fort Randall Act disestablished the

boundaries of the Lower Brule Reservation.[24] Moreover, although practical problems of law enforcement may be a relevant factor in determining abrogation questions, such problems cannot support a finding of abrogation when no clear congressional intent to

---

[24] For example, in concluding that South Dakota possesses exclusive jurisdiction to regulate hunting and fishing by tribal members within the taken areas, the district court stated:

> In summary, this Court is well aware of general principles in Indian law which properly limit the reach of state authority in Indian country. But Wounded Knee compels the conclusion that Congress changed the reservation to an area without defined or identifiable boundaries. To avoid the corresponding jurisdictional confusion over hunting and fishing, Congress provided that tribal hunting and fishing rights, within the entire taken area, were subject to the same regulations which govern the corresponding use of other citizens of the United States. [Emphasis included.]

do so is expressed in a statute or its legislative history and other surrounding circumstances.

Ultimately, the district court's principal error in resolving the abrogation issue was that it failed to consider the possibility that Congress intended to limit the treaty hunting and fishing rights, by subjecting them to regulation by the Corps of Engineers or Secretary of Army, but not totally abrogate the Tribe's right to hunt and fish on its reservation free of state regulation. The comments of the Supreme Court in 1905 in United States v. Winans, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905), concerning the treaty fishing rights of the Northwest Tribes remain germane today:

> New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away.

In summary, then we hold that the Flood Control, Fort Randall and Big Bend Acts did not abrogate the treaty right of the Lower Brule Sioux to hunt and fish on their reservation free of state regulation. Congress was well aware that it could unilaterally terminate tribal rights and has done so on many occasions. See Bryan v. Itasca County. 426 U.S. 373, 389-390 & n. 15, 96 S.Ct. 2102, 2111-2112 & n. 15, 48 L.Ed.2d 710 (1976). Nonetheless, in the Fort Randall and Big Bend Acts, it failed to expressly abrogate the treaty hunting and fishing rights of the Lower Brule Sioux and to subject them to state law. Moreover, neither the legislative histories nor surrounding circumstances of those Acts reveals a clear congressional purpose to effectuate such an abrogation. Because we can find that Congress has abrogated Indian treaty rights only if it has clearly expressed its

intent to do so and because doubtful expressions of intent must be resolved in favor of the Indians, see slip op., supra, at 822, we must reverse the district court's finding that Congress has abrogated the treaty right of the Lower Brule Sioux to hunt and fish free of state regulation within the Fort Randall and Big Bend taking areas and has expressly authorized South Dakota to apply its laws to hunting and fishing activities by tribal members within those reservation areas.

IV.

REGULATORY JURISDICTION

Because of our holding on the disestablishment and abrogation issues, we must also reverse the district court's finding that South Dakota has exclusive jurisdiction to regulate hunting and fishing by members of the Lower Brule Tribe within the Fort Randall and Big Bend taking areas. The

Flood Control, Fort Randall and Big Bend Acts could not have conferred such exclusive regulatory jurisdiction on South Dakota when they neither disestablished the Lower Brule Reservation, abrogated the Tribe's treaty right to hunt and fish on the reservation free of state regulation, nor authorized the application of state law to the hunting and fishing activities of tribal members on the reservation within the taken areas. See supra, at 815, 821-822. Accordingly, the Lower Brule Sioux retain jurisdiction over tribal hunting and fishing within the land in controversy here, subject only to federal regulation authorized by Congress. Id. see New Mexico v. Mescalero Apache Tribe, ____ U.S. _____, ____, 103 S.Ct. 2378, 2382-2387, 76 L.Ed.2d 611 (1983).

In addition, the district court held that South Dakota possesses exclusive jurisdiction to regulate hunting and fishing by

nonmembers of the Lower Brule Tribe within the Fort Randall and Big Bend taking areas. We believe that this judgment must be vacated and remanded for reconsideration in light of our decision here. We cannot be certain that the district court's erroneous disestablishment and abrogation findings did not influence its determination that the state can exclusively regulate hunting and fishing by nonmembers of the Tribe within the taken areas. Indeed, that determination probably was affected by the district court's conclusion that the Tribe had lost its hunting and fishing rights within the taken areas since the court refused to grant summary judgment on the issue of jurisdiction over hunting and fishing within the exterior boundaries of the reservation outside the taken areas. Under these circumstances, we believe that a remand is appropriate in order to permit the district

court to make the necessary particularized inquiry into the state, federal and tribal interests at stake to determine who possesses jurisdiction to regulate hunting and fishing by nonmembers of the Tribe within the Fort Randall and Big Bend taking areas. See New Mexico v. Mescalero Apache Tribe, supra, ___ U.S. at ___, 103 S.Ct. at 2381; Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed2d 493 (1981); White Mountain Apache Tribe v. Bracker, supra, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665.

V.

CONCLUSION

For the above-stated reasons, the district court's judgment is reversed and this matter is remanded for further proceedings consistent with this opinion.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1635-SD September Term, 1982

Lower Brule Sioux Tribe,
Appellant,
vs.
State of South Dakota et al.,
Appellees.

No. 82-1635-SD

Lower Brule Sioux Tribe,
Appellee,
vs.
State of South Dakota et al.,
Appellants.

Appeals from the United States District Court for the District of South Dakota.

These appeals from the United States District Court were submitted on the record of said District Court, briefs of the parties, and were argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said

District Court in these causes be, and the same is hereby, reversed and remanded to the said District Court for proceedings consistent with the opinion of this Court.

June 27, 1983

A True Copy:

ATTEST:

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 82-1635/1636. September Term, 1982

Lower Brule Sioux Tribe, Appellant/Cross-Appellee,	)	
vs.	)	Appeal from the United States District Court for the District of South Dakota.
State of South Dakota, et al., Appellees/Cross-Appellants.	)	

Petition of appellees/cross-appellants' for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 26, 1983

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 82-1635/1636. September Term, 1982

Lower Brule Sioux Tribe, Appellant/Cross-Appellee,	)	
vs.	)	Appeal from the United States District Court for the District of South Dakota.
State of South Dakota, et al., Appellees/Cross-Appellants.	)	

The Court, having considered appellees/cross-appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

July 26, 1983

APPENDIX F

PUBLIC LAW 85-923-SEPT. 2, 1958

Public Law 85-923

AN ACT

To provide for additional payments to the Indians of the Lower Brule Sioux Reservation, South Dakota, whose lands have been acquired for the Fort Randall Dam and Reservoir project, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Secretary of the Army is authorized and directed to pay to the Lower Brule Sioux Tribe and the individual Indian owners, out of funds made available for the Fort Randall Dam and Reservoir project, in settlement of all claims, rights and demands of said tribe

and its members arising out of the construction of the Fort Randall Dam and Reservoir project, an amount equal to the difference between $976,523 and the sum paid for the taking of lands in condemnation proceedings entitled "United States of America, Plaintiff against 7,996.62 acres of land etc. and Lower Brule Tribe of Sioux Indians et al., Defendants", civil number 186, filed in the United States District Court for the District of South Dakota.

SEC. 2. The payments authorized by section 1 of this Act shall be deposited to the credit of the Lower Brule Sioux Tribe in the Treasury of the United States to draw interest on the annum until expended. The sum of $85,242.35 shall be allocated to the former owners on a prorated basis in accordance with the tract and ownership schedules set forth in the condemnation proceedings referred to in section 1, after consultation

with the Missouri River Basin investigation staff and the tribal council to correct known errors. The amounts allocated to the lands owned by individual Indians shall be credited to their respective individual Indian money accounts. No part of the compensation for the property taken by the condemnation proceedings referred to in section 1, whether paid in the proceedings or under this Act, shall be subject to any lien, debt, or claim of any nature whatsoever against the tribe or individual Indians except delinquent debts owned by the tribe to the United States or owned by individual Indians to the tribe or to the United States. The cost of moving dwellings and other buildings owned by the Indians from the Fort Randall Dam and Reservoir project area shall be paid out of the part of the payment authorized under section 1 and payable to the tribe.

SEC. 3. The Secretary of the Army shall revest or cause to be revested in the former owners all of the right, title, and interest of the United States in minerals acquired through the condemnation proceedings referred to in section 1 of this Act; but the exploration, exploitation, and development of the minerals, including oil and gas, shall be subject to all reasonable regulations which may be imposed by the Secretary of the Army for the protection of the Fort Randall Dam and Reservoir project.

SEC. 4. Individual Indians and the tribe are authorized without charge to retain timber and improvements previously removed by them from the lands acquired in the condemnation proceedings referred to in section 1 hereof; and former owners shall also have the right, without charge, prior to September 30, 1958, to cut and remove any

remaining timber and salvage any remaining improvements on the respective lands acquired from them in said condemnation proceedings; but, if said rights are waived or not exercised by September 30, 1958, the tribe, through the tribal council, may, prior to January 1, 1959, exercise the rights: PROVIDED, That the salvage previously accomplished or permitted by this section shall not be construed to be double compensation.

SEC. 5. After the Randall Dam gates are closed and the waters of the Missouri River impounded, the said Indian tribe and the members thereof shall be given exclusive permission, without cost, to graze stock on the land between the water level of the reservoir and the exterior boundary of the taking area. The said tribal council and the members of said Indian tribe shall be permitted to have, without cost, access to

the shoreline of the reservoir including permission to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

SEC. 6. For the purposes of (1) providing substitute land for individual Indians whose land is within the taking area, (2) consolidating land holdings, and (3) eliminating fractionated heirship interests within the reservation, the Secretary of the Interior is authorized to purchase, with funds made available by such individual Indians or by the tribe, land or interests in land, and to sell tribal land upon request of the tribe, but no service charge shall be made by the United States. The land selected by and purchased for individual Indians may be either inside or outside the boundaries of the reservation as

diminished. Title to any land or interests in land acquired within the boundaries of the reservation shall be taken in the name of the United States in trust for the tribe or the individual Indian for whom the land is acquired, and title to any land or interests in land acquired outside the boundaries of the reservation shall be taken in the name of the individual for whom it is acquired. Trust titles shall be subject to the laws and regulations applicable to other trust titles within the reservation.

For the purposes of this section, the Secretary of the Interior is also authorized to partition or sell individually owned land in which all interests are in a trust or restricted status upon request of the owners of a 51 per centum interest in the land. Any such sale shall be by competitive bid except that with the concurrence of the owners of a 51 per centum interest in the

land, any owner of an interest in the land, or the tribe, if the land is within the reservation, shall have the right to purchase the land within a reasonable time fixed by the Secretary prior to a competitive sale at not less than its appraised value. If more than one preference right is exercised, the sale shall be by competitive bid limited to the tribe and to the persons entitled to a preference. The Secretary of the Interior may represent for the purpose of this paragraph any Indian owner who is a minor, or who is non compos mentis and, after giving reasonable notice of the proposed sale by publication, may represent an Indian owner who cannot be located, and he may execute any title documents necessary to convey a marketable and recordable title.

Nothing in this section shall be construed to diminish the authority to acquire,

sell, or exchange land that is contained in other provisions of law.

SEC. 7. No part of any expenditure made by the United States under any or all of the provisions of this Act shall be charged as an offset or counterclaim against any tribal claim which has arisen under any treaty, law, or Executive order of the United States prior to the effective date of taking of said land as provided for in section 1 hereof and the payment of Sioux benefits as provided for in section 17 of the said Act of March 2, 1889 (25 Stat. 888), as amended, shall be continued under the provisions of section 14 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), on the basis now in operation without regard to the loss of tribal land within the taking area under the provisions of this Act.

SEC. 8. The Secretary of the Treasury, upon certification by the Secretary of Interior, shall reimburse the tribe for fees and expenses incurred in connection with the taking of tribal and individual Indian lands for the Randall project: PROVIDED, That such reimbursable fees and expenses do not exceed in the aggregate $100,000, of which not more than $50,000 shall be reimbursable as attorney fees.

SEC. 9. There is hereby authorized to be appropriated such sums as may be necessary for the purposes of this Act.

SEC. 10. All funds paid to the tribe and individual Indians, either pursuant to this Act or pursuant to the condemnation action referred to in section 1 of this Act, shall be exempt from all forms of State and Federal taxation.

SEC. 11. Any individual member of the Lower Brule Sioux Tribe shall have the right

to reject the sum tendered to him as his share of the $85,242.35 in accordance with the proration under section 2 of this Act by filing within one year a notice of rejection with the Chief of Engineers, United States Army, Washington, District of Columbia. If the court, in the condemnation proceedings referred to in section 1, in determining the just compensation to which the individual is entitled, fixes an amount in excess of the amount theretofore tendered to him, the Secretary of the Army shall deposit the difference in court. No court costs shall be charged against an individual but all other costs and expenses, including counsel fees, shall be at the contesting individual's expense.

Approved September 2, 1958.

APPENDIX G

PUBLIC LAW 87-734-OCT. 3, 1962

Public Law 87-734

AN ACT

To provide for the acquisition of and the payment for individual Indian and tribal lands of the Lower Brule Sioux Reservation in South Dakota, required by the United States for the Big Bend Dam and Reservoir project on the Missouri River, and for the rehabilitation, social, and economic development of the members of the tribe, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That in furtherance of the Big Bend Dam and Reservoir project authorized by the Flood Control Act of December 22, 1944 (58 Stat. 887, 891)--

(a) The entire interest, including gravel but excluding the interest in oil, gas, and all other minerals of any nature whatsoever, in approximately 14,299.03 acres of land within the taking area described in this Act in the Lower Brule Sioux Reservation in South Dakota, in which the Lower Brule Sioux Tribe or individual Indians have a trust or restricted interest, and any interest the tribe or Indians may have within the bed of the Missouri River so far as it is within the boundaries of the reservation are hereby taken by the United States for the Big Bend Dam and Reservoir project on the Missouri River, and in consideration thereof and for trust or restricted lands heretofore acquired by the United States in condemnation proceedings for the Big Bend project the United States will pay

to the tribe and the individual Indian owners, out of funds available for the Big Bend Dam and Reservoir project--

(1) a sum aggregating $825,000, to be disbursed in accordance with the provisions of schedules prepared pursuant to section 2(b) of this Act; and

(2) the amount of $400,715, which shall be in settlement of all claims, rights, and demands of the tribe and individual Indians arising out of the taking under this Act, to be disbursed in accordance with the provisions of section 2 hereof.

(b) Upon a determination by the Secretary of the Army, within two years from the date of enactment of this Act, filed among the appropriate land records of the Department of the Interior, that any of the lands described in this Act are not required

for Big Bend project purposes, title to such land shall be revested in the former owner.

SEC. 2. (a) The payments authorized by section 1 of this Act, less the amounts heretofore deposited by the United States in the case entitled United States of America, Plaintiff against 667.50 acres of land, etc., and Crow Creek Tribe of Sioux Indians et al., Defendants, civil numbered 335, filed in the United States District Court for the District of South Dakota, for trust property acquired in the taking area described in this Act, shall be deposited to the credit of the tribe in the Treasury of the United States and shall draw interest on the principal at the rate of 4 per centum per annum until expended.

(b) The amount paid pursuant to section 1(a)(1) of this Act shall be allocated in accordance with Indian ownership schedules

prepared by the Secretary of the Interior, after consultation with the Lower Brule Tribal Council to correct known errors and to insure fair and equitable allocation. These schedules shall reflect the amount agreed upon by the Secretary of the Army and the Secretary of the Interior as the basis for negotiation, after appropriate acreage adjustments, increased by a uniform percentage to equal the amount paid. The amounts allocated for payment of property owned by individual Indians shall be credited to their respective individual Indian money accounts. No part of the compensation provided for in section 1 shall be subject to any lien, debt, or claim of any nature whatsoever against the tribe or the individual Indian owners entitled to the compensation, except delinquent debts owed to the United States by the tribe, or delinquent debts owed to the tribe or the United

States by the individual Indians entitled to the compensation: PROVIDED, That such compensation shall not be applied to the payment of such individual delinquent debts unless the Secretary of the Interior first determines and certifies that no hardship will result from the payment of such delinquent debts.

(c) The tribal council, with the approval of the Secretary of the Interior, shall make available from the funds authorized by section 1(a)(2) of this Act not to exceed $247,325, to pay the expenses, costs, losses, and damages incurred by members of the tribe as a direct result of moving themselves and their possessions, including dwellings and other buildings owned by the individual members, on account of the acquisition referred to in section 1 of this Act. The balance of the amount paid pursuant to section 1(a)(2) shall be consolidated with

the appropriation authorized by section 3 of this Act and shall be expended in accordance with the provisions of section 3.

SEC. 3. There is authorized to be appropriated the additional sum of $1,968,750 which shall be deposited in the Treasury of the United States to the credit of the tribe and which shall draw interest on the principal at the rate of 4 per centum per annum until expended, for the purposes of developing individual and family plans, relocating, reestablishing, and providing other assistance designed to improve the economic and social conditions of enrolled members of the tribe on the date of enactment of this Act. The funds authorized by this section shall be expended in accordance with plans and programs approved by both the tribal council and the Secretary of the Interior: PROVIDED, That $400,000 shall be

allocated exclusively for industrial development on the reservation or within fifty miles of any exterior boundary of the reservation with preferential right of employment for members of the tribe. Nothing in this Act shall be construed to prevent cooperative action with the Crow Creek Sioux Tribe on industrial development or other programs: AND PROVIDED FURTHER, That no part of such funds shall be used for per capita payments, or for the purchase of land by the tribe except for the purpose of resale to individual Indians in furtherance of the rehabilitation program authorized by this section, which resale is hereby authorized.

SEC. 4. The Secretary of the Army, out of funds appropriated for the Big Bend project other than funds provided by this Act, is authorized and directed to relocate and reestablish such Indian cemeteries, tribal monuments, and shrines within the

taking area of the Big Bend project as the tribal council, with the approval of the Secretary of the Interior, shall select and designate: PROVIDED, That reinterment of individual remains, but not entire cemeteries, outside the reservation boundaries is authorized if desired by the next of kin and approved by the tribal council, but in no event will reinterment be made to a site which exceeds the equivalent distance from the disinterment site to the farthest point at which reinterment could be made within the reservation boundaries.

SEC. 5. The Secretary of the Army is authorized and directed out of funds appropriated for the Big Bend project other than funds provided by this Act to protect, replace, relocate, or reconstruct any existing essential governmental and agency facilities on the reservation, including schools, hospitals, Public Health Service

and Bureau of Indian Affairs offices, facilities, service buildings, and employees' quarters, roads, bridges, and incidental matters or facilities in connection therewith, which the Secretary of the Interior determines will be impaired or required by reason of the Big Bend project: PROVIDED, HOWEVER, That the design criteria employed shall be reasonably comparable to that of the presently existing roads, bridges, and facilities.

SEC. 6. The Secretary of the Army, under plans approved by the Secretary of the Interior after consultation with the Lower Brule Tribal Council, is authorized and directed, out of funds appropriated for the Big Bend project other than funds provided by this Act, to locate, lay out, and construct on tribal land on a site provided by the Lower Brule Sioux Council with the approval of the Secretary of the Interior a

townsite for the new town of Lower Brule, including substitute and replacement streets, utilities, including water, sewerage, and electricity, taking into account the relocation and replacement of the governmental and agency facilities as provided for in section 5 of this Act and the reasonable future growth of the new town: PROVIDED, HOWEVER, That the design criteria employed shall be reasonably comparable to that of the existing town streets, utilities, and facilities. The tribal council is authorized, with the approval of the Secretary of the Interior (a) to convey, with or without compensation, tribal land, exclusive of minerals, for church or cemetary purposes for so long as the land is used for such purposes, and (b) to sell unimproved lots, exclusive of minerals, in

the relocated town of Lower Brule at competitive sale to the highest qualified bidder but for not less than the appraised value, pursuant to such terms and conditions as the Secretary of the Interior may prescribe.

SEC. 7. All minerals of any kind whatsoever, including oil and gas, but excluding gravel, in the lands taken by this Act are hereby reserved for the benefit of the tribe or individual Indian owners as their interests may appear. All right, title, and interest of the United States in such minerals in trust or restricted land heretofore acquired by the United States for the Big Bend project are hereby revested in the former owners. All such minerals in trust or restricted land hereafter acquired by the United States for the Big Bend project shall be reserved for the benefit of the owners as their interests may appear. Notwithstanding the foregoing provisions of

this section the exploration and development of such minerals, including oil and gas, within the taking area shall be subject to all reasonable regulations of the Secretary of the Army necessary for the protection of the Big Bend project.

SEC. 8. Members of the Lower Brule Sioux Tribe now residing within the taking area of the Big Bend project shall have the right without charge to remain on and use the lands taken by this Act until required to vacate at such times as may be fixed by the Secretary of the Army, with the approval of the Secretary of the Interior: PROVIDED, That the time for vacating in any event will not extend beyond July 1, 1963.

SEC. 9. Individual Indians and the tribe are authorized without charge to retain timber and improvements removed by them from their respective trust or restricted lands on the reservation acquired

by this Act and heretofore acquired by the United States for the Big Bend project. Up to sixty days before the individual Indian landowners and the tribe are required to vacate the taking area in accordance with this Act, they shall have the right, without charge, to cut and remove all timber and to salvage any improvements on their respective lands, but, if such rights are not exercised or are waived within the time prescribed, the tribe, through its tribal council, may exercise such rights: PROVIDED, That the timber cut and the salvage permitted by this section shall not be construed to be compensation.

SEC. 10. Subject to the right of the United States to occupy, use, and control trust and restricted lands acquired by this Act and heretofore acquired in condemnation action civil numbered 335 for the construction, operation, and maintenance of the Big

Bend Dam and Reservoir project pursuant to the Flood Control Act of 1944, approved December 22, 1944, and amendatory laws, as determined necessary by the Secretary of the Army adequately to serve said purposes, the Lower Brule Sioux Tribe shall be permitted, after the Big Bend Dam gates are closed and the waters of the Missouri River impounded, to graze stock without charge on such of the land described in this section as lies between the level of the reservoir and the taking line described in section 16 of this Act and as the Secretary of the Army determined is not devoted to other beneficial uses and to lease such land for grazing purposes to members or nonmembers of the tribe on such terms and conditions as the Secretary of the Interior may prescribe. The tribe and members thereof shall have without cost the right of free access to the

shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

SEC. 11. Notwithstanding any other provision of law, for the purposes of (1) providing substitute land for individual Indians who owned land within the taking area of the Fort Randall or Big Bend projects, (2) consolidating landholdings, and (3) eliminating fractionated heirship interests within the reservation, the Secretary of the Interior is authorized to purchase, with funds made available by such individual Indians or by the tribe, land or interests in land, and to sell tribal land upon request of the tribe, but no service charge shall be made by the United States. The

land selected by and purchased for individual Indians may be either inside or outside the boundaries of the reservation. Title to any land or interests in land acquired within the boundaries of the reservation shall be taken in the name of the United States in trust for the tribe or the individual Indian for whom the land is acquired, and title to any land or interests in land acquired outside the boundaries of the reservation shall be taken in the name of the individual for whom it is acquired: PROVIDED, That title to lands outside the exterior boundaries of the reservation acquired by the tribe shall be taken in the name of the tribe subject to a restriction against alienation without the consent of the Secretary of the Interior, but shall not be exempt from taxation.

For the purposes of this section, the Secretary of the Interior is authorized to

partition or sell individually owned lands in which all interests are held in trust or restricted status (1) upon the request of the owners of not less than a 25 per centum interest in such land where ten persons or more own or claim interests in the land, or (2) upon the request of the owners of not less than a 50 per centum interest in such land where fewer than ten persons own or claim interests in the land. For the purpose of this section, the Secretary of the Interior may represent any Indian owner who is a minor or who is under any other legal disability, and the Secretary, after first giving reasonable notice by publication of the proposed sale, is authorized to represent any Indian owner or claimant who cannot be located after reasonable and diligent search. Sales of all Indian trust or restricted interests in land shall be in accordance with the following procedure:

(a) Upon receipt of requests from the required ownership interests, the Secretary shall notify the tribe and each owner of an undivided Indian interest in the land by a letter directed to his last known address that each such owner and the tribe has a right to purchase the land for its appraised value, unless one of the owners objects within the time fixed by the Secretary, or for a lower price if all of the owners agree, and that if more than one owner or if one owner and the tribe wants to purchase the land it will be sold on the basis of sealed competitive bids restricted to the owners of undivided interest in the land and the tribe.

(b) If no Indian owner of an undivided interest in the land elects to purchase the land within the time fixed by the Secretary, and the tribe owns no interest in the land, the Secretary shall offer to sell the land

at its appraised value to the tribe, unless one of the Indian owners or his authorized representative objects within the time fixed by the Secretary to a sale to the tribe at the appraised value.

(c) If any Indian owner or his authorized representative objects to a sale to the tribe at the appraised value, the Secretary shall offer the land for sale by sealed competitive bid with a preferential right in the tribe or any Indian owner to meet the high bid, unless one of the Indian owners or his authorized representative objects within the time fixed by the Secretary to the grant of such preferential right. All bids shall be rejected if no bid substantially equal to the appraised value is received.

(d) If any Indian owner or his authorized representative objects to a sale by sealed competitive bid with a preferential right to meet the high bid, the Secretary

shall offer the land for sale by sealed bids without such preferential right: PROVIDED, That, if at any time before sealed bids are invited the tribe or one of the Indian owners asks that the land be sold at auction, then after notice to all interested parties, including the tribe, the land shall be sold at auction immediately after the opening of the sealed bids and auction bidding shall be limited to the Indian owners, the tribe, and persons who submitted sealed bids in amounts not less than 75 per centum of the appraised value of the land. The highest sealed bid shall be considered the opening auction bid. No sale shall be made unless the price is equal to the highest sealed bid and substantially equal to the appraised value.

(e) The Secretary may, when he deems it in the best interests of the Indian owners, obtain a power of attorney from the

owner of a non-Indian interest in the land to be sold authorizing the Secretary to sell and convey the interest of the non-Indian owner in accordance with any part of the procedure provided in this section.

SEC. 12. The Secretary of the Treasury, upon certification by the Secretary of the Interior, shall reimburse the tribe for fees and expenses incurred in connection with the taking of Indian lands within the reservation for the Big Bend project: PROVIDED, That such reimbursable fees and expenses shall not exceed in the aggregate, $75,000: PROVIDED FURTHER, That attorney fees shall be paid under the terms of a contract approved by the Secretary of the Interior.

SEC. 13. (a) Any individual Indian who has been duly tendered payment in accordance with the schedules prepared pursuant to section 2(b) of this Act, shall have the

right to reject the sum tendered by filing a notice of rejection with the Chief of Engineers, United States Army, Washington, District of Columbia, or with the superintendent of the Pierre Indian Agency, Pierre, South Dakota, within one year from the date of enactment of this Act or within ninety days after the tender is made, whichever date is later. For the purpose of this section, the Secretary of the Interior and the tribe are authorized to represent any Indian entitled to payment who is a minor, or under any other legal disability, or who cannot be located after a reasonable and diligent search, and any person who is an undetermined heir or devisee of a deceased Indian.

(b) If the land of any Indian rejecting payment is included in condemnation proceedings heretofore instituted, the court

in those proceedings shall proceed to determine the just compensation to which the individual is entitled and, if the land is not included in such condemnation proceedings, jurisdiction is hereby conferred upon the United States District Court for the District of South Dakota to determine just compensation in accordance with procedures applicable to the determination of just compensation in condemnation proceedings. No court or statutory costs, but all other costs and expenses, including attorney's fees, shall be at the contesting individual's expense. Suit may be brought on behalf of any individual rejecting payment within one year after the date of the rejection. If a notice of rejection of the tender of payment is filed, at least 10 per centum of the tender deposited in the individual Indian money account shall be

withheld from disbursement pending a final determination under this subsection.

SEC. 14. No part of any expenditure made by the United States under any of the provisions of this Act shall be charged by the United States as an offset or counter-claim against any tribal claim against the United States which has arisen prior to the date of enactment of this Act. The payment of Sioux benefits as provided for in section 17 of the Act of March 2, 1889 (25 Stat. 888), as amended, shall be continued under the provisions of section 14 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), on the basis now in operation without regard to the loss of tribal land within the taking area for the Big Bend project.

SEC. 15. There is hereby authorized to be appropriated such amounts as may be necessary for the purposes of this Act.

SEC. 16. The land taken by section 1 of this Act, embracing approximately 14,299.03 acres, and the land heretofore acquired in condemnation proceedings by civil numbered 335, embracing approximately 310.00 acres, are the lands identified and delimited on a map entitled, "A map delimiting tribal and individual Indian trust and restricted land of the Lower Brule Sioux Reservation acquired by the United States for the Big Bend Dam and Reservoir project for the sum of $850,000". Legal descriptions of the lands shown therein shall be prepared by the Secretary of the Army and attached thereto. The map and descriptions shall be prepared by the Secretary of the Army and shall be filed among the land records of the Bureau of Indian Affairs in Washington, District of Columbia, and a duplicate original filed and maintained at the agency in Pierre, South Dakota. A true

and correct copy of the map and descriptions shall be furnished without cost to the tribe. The Secretary of the Army shall prepare and furnish the Secretary of the Interior and the tribe tract by tract legal descriptions of trust and restricted land acquired by this Act within two years of enactment of this Act: PROVIDED, That within ninety days after notice of rejection is filed pursuant to subsection 13(a) the Secretary of the Army shall furnish to the individual Indian and to the Superintendent of the Pierre Indian Agency a legal description of the lands covered by the rejection.

SEC. 17. All funds authorized by this Act paid to the tribe and individual Indians shall be exempt from all forms of State and Federal taxation.

SEC. 18. The Secretary of the Army is authorized and directed to pay to any bona fide lessee or permittee owning improvements

situated on Indian tribal land the fair value, as determined by the Secretary, or by a court of competent jurisdiction, of any such improvements which will be rendered inoperative or be otherwise adversely affected by the construction of the Big Bend Dam and Reservoir project.

Approved October 3, 1962.

APPENDIX H

PUBLIC LAW 78-534, December 22, 1944

[CHAPTER 665]

AN ACT

Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to

the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or

reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of

Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would

be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The

Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth

meridian, of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except

upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3(a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

SEC. 2. That the words "flood control" as used in section 1 of the Act of June 22, 1936, shall be construed to include channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction

of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

SEC. 3. That section 3 of the Act approved June 22, 1936 (Public, Numbered 738, Seventy-fourth Congress), as amended by section 2 of the Act approved June 28, 1938 (Public, Numbered 761, Seventy-fifth Congress), shall apply to all works authorized in this Act, except that for any channel improvement or channel rectification project provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law: PROVIDED, That the authorization for any flood-control project herein adopted requiring local cooperation shall expire five years from the date on which local interests are notified in writing by

the War Department of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of War that the required cooperation will be furnished.

SEC. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: PROVIDED, That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for

the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges

shall be deposited in the treasury of the United States as miscellaneous receipts.

SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including

the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 6. That the Secretary of War is authorized to make contracts with States,

municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: PROVIDED, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: PROVIDED, That this section

shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi River the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for

irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: PROVIDED, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part

by the Army engineers, which provides conservation storage of water for irrigation purposes.

SEC. 9(a) The general comprehensive plans set forth in House Document 375 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said

expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the

partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with

the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: PROVIDED, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: PROVIDED FURTHER, That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: AND PROVIDED FURTHER, That penstocks and other similar facilities

adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

APPENDIX I

PUBLIC PARK AND RECREATIONAL FACILITIES AT WATER RESOURCE DEVELOPMENT PROJECTS

§ 460d. Construction and operation of public parks and recreational facilities in water resource development projects; lease of lands; preference for use; penalty; application of section 3401 of Title 18; citations and arrests with and without process; limitations; disposition of receipts.

The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized to construct, maintain, and operate public park and recreational facilities at water resource development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests (particularly those to be operated and maintained by such

interests), and to permit the maintenance and operation of such facilities by local interests. The Secretary of the Army is also authorized to grant leases of lands, including structures or facilities thereon, at water resource development projects for such periods, and upon such terms and for such purposes as he may deem reasonable in the public interest: PROVIDED, That leases to non-profit organizations for park or recreational purposes may be granted at reduced or nominal considerations in recognition of the public service to be rendered in utilizing the leased premises: PROVIDED FURTHER, That preference shall be given to Federal, State, or local governmental agencies, and licenses or leases where appropriate, may be granted without monetary considerations, to such agencies for the use of all or any portion of a project area for

any public purpose, when the Secretary of the Army determines such action to be in the public interest, and for such periods of time and upon such conditions as he may find advisable: AND PROVIDED FURTHER, That in any such lease or license to a Federal, State, or local governmental agency which involves lands to be utilized for the development and conservation of fish and wildlife, forests, and other natural resources, the licensee or lessee may be authorized to cut timber and harvest crops as may be necessary to further such beneficial uses and to collect and utilize the proceeds of any sales of timber and crops in the development, conservation, maintenance, and utilization of such lands. Any balance of proceeds not so utilized shall be paid to the United States at such time or times as the Secretary of the Army may determine appropriate. The water areas of all such

projects shall be open to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary including but not limited to prohibitions of dumping and unauthorized disposal in any manner of refuse, garbage, rubbish, trash, debris, or litter of any kind at such water resource development projects, either into the waters of such projects or onto any land federally owned and administered by the Chief of Engineers. Any violation of such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any

persons charged with the violation of such rules and regulations may be tried and sentenced in accordance with the provisions of section 3401 of Title 18. All persons designated by the Chief of Engineers for that purpose shall have the authority to issue a citation for violation of the regulations adopted by the Secretary of the Army, requiring the appearance of any person charged with violation to appear before the United States magistrate, within whose jurisdiction the water resource development project is located, for trial; and upon sworn information of any competent person any United States magistrate in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said regulations; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken

in the act of violating said regulations. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received by the United States for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

Dec. 22, 1944, c.665, § 4, 58 Stat. 889; July 24, 1946, c.596, § 4, 60 Stat. 642; Sept. 3, 1954, c.1264, Title II, § 209, 68 Stat. 1266; Oct. 23, 1962, Pub.L. 87-874, Title II, § 207, 76 Stat. 1195; Sept. 3, 1964, Pub.L. 88-578, § 2(a), 78 Stat. 899; Dec. 31, 1970, Pub.L. 91-611, Title II, § 234, 84 Stat. 1833.